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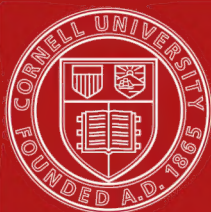
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**A treatise on the pleadings in suits in**



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MITFORD'S AND TYLER'S  
PLEADINGS AND PRACTICE IN EQUITY.

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A TREATISE  
ON THE  
PLEADINGS IN SUITS  
IN THE  
COURT OF CHANCERY  
BY ENGLISH BILL.

---

BY JOHN MITFORD, Esq.,  
(*The late Lord Redesdale.*)

---

WITH THE NOTES OF GEORGE JEREMY, ESQ. AND ADDITIONAL NOTES

BY JOSIAH W. SMITH, B. C. L.,

*Of Lincoln's-Inn, Esq., Barrister-at-Law.*

SUPPLEMENTED

BY AN INTRODUCTION; DISSERTATIONS ON PARTIES TO SUITS IN EQUITY;  
PLEADINGS IN SUITS IN EQUITY; PRACTICE IN SUITS IN EQUITY;  
WITH FORMS OF PROCEDURE IN EQUITY, AND NOTES; AND  
THE PRACTICE IN EQUITY OF THE UNITED STATES COURTS.

BY SAMUEL TYLER, LL. D.,

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THIS WORK IS RESPECTFULLY INSCRIBED.





## P R E F A C E .

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“To no authority, living or dead, can reference be had with more propriety” (said Sir Thomas Plumer), “for correct information respecting the principles by which courts of equity are governed, than to one whose knowledge and experience enabled him, fifty years ago, to reduce the whole subject to a system with such a universally acknowledged learning, accuracy, and discrimination, as to have been ever since received by the whole profession as an authoritative standard and guide.” This was said of Mitford and his work now before us. The first edition of the work was published 1782; the second, 1787; the third, with large additions, 1814; the fourth edition, with references and notes, by George Jeremy, 1827. Jeremy prepared his edition under the supervision of the author, who died in 1830. I pass by the six American editions of Mitford; as a notice of them is not within the purpose of this book.

Mitford was, in 1802, appointed Lord High Chancellor of Ireland; and, in 1809, was raised to the peerage, as Baron Redesdale. He had, some time before, resigned the Chancellorship of Ireland.

Walpole, in his Lectures on Equity at the London Law Institution, says of Lord Redesdale’s Treatise on Pleading: “It was composed, moreover, not for ambition or profit, but simply in the course of his duties, for the education of another man, at that time only his pupil, and who profited so greatly by its profound learning, and gained from it such

a thorough knowledge of sound principles, that not long after the retirement of his gifted instructor, that pupil succeeded him in the same distinguished office. I mean the present Lord Manners." So I, simply in the course of my duties as a teacher of equity, have reproduced the work of Mitford, supplemented by treatises which, I trust, make it a work on pleadings in equity adequate to the requirements of instruction at the present time; and have added to it a treatise on practice in equity, with sufficient forms, so as to make the volume a guide, both to the student and the practitioner, through the whole course of equity procedure.

It is important to the student of any subject to be able to take in the whole of it at one view, so as to comprehend it as a system of correlated and coherent principles, rules and doctrines. To that end, I have given a succinct treatise on pleadings in suits in equity, by which the principles, the rules, and the forms, with their respective functions, can be comprehended as a complete scheme, fulfilling all the ends in conducting a suit in equity. The knowledge thus obtained can be completed by the study of the treatise of Mitford. The treatise on Parties which I have given, while sufficient for the practitioner, is so succinct that its doctrines are readily comprehended as constituting a system of logical consistency. And the analysis of it given in the index, under the word "Parties," puts the subject within still narrower limits of view. The treatise on Practice which I have given, as concise and practically consecutive as it is, is rendered still plainer by the analytical index by which it is accompanied. And the practitioner, also, will derive profit from seeing the subjects in system.

The whole volume is prepared in accordance with the dictum of Lord Mansfield, in 3 Doug. 332: "The law does not consist of particular cases, but of general principles, which

are illustrated and explained by those cases." The present style of editing books, by overloading them with vast accumulations of references to cases, makes them rather indexes than treatises, and unfits them for books of instruction. I have used the last English edition of Mitford, by Josiah W. Smith. While I have retained all the notes and references by Jeremy, I have left out far the larger part of those by Smith as altogether unsuited to my purpose, consisting as they do of a digest of cases on Parties, and references to the modified English practice, of no authority in this country. I have added some marginal notes and references of my own to the treatise of Mitford.

S. T.

WASHINGTON CITY, D. C.,  
Sept. 20, 1876.





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BY SAMUEL TYLER.

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BY SAMUEL TYLER.

[*The contents of this Treatise on Practice are given in the index to the Treatise, at page 751.*]

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# INTRODUCTION.

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BY SAMUEL TYLER.

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THE Constitution of the United States recognizes both common law and equity as Federal jurisprudence, with their respective procedures, just as the separate States had done for themselves respectively. As, therefore, the same legal and equitable doctrines, and the same principles of procedure, at law and in equity, prevail in the Federal and State courts, it is manifestly expedient, in order to maintain a uniform jurisprudence, that the great English treatises on common law and equity pleading, which are recognized guides in both the Federal and the State courts, should be edited from rather a Federal than a State point of view. Judges of the Supreme Court of the United States, when delivering the opinion of the court, as well as in dissenting opinions, sometimes introduce into their reasonings the provincial narrowness and idiosyncracies of the courts of their respective States. This should be prevented, by establishing a universality of doctrine. Therefore, the variant decisions of the respective State courts should not be adduced in notes as authority, but rather the decisions of the Supreme Court of the United States, and those of the State courts which accord with them. And the decisions of State courts which do not accord with them should be analyzed and tested by the

general principles which pervade the system of pleading, so that the light of the contrary decisions should be presented for what it is worth. And as this edition of Mitford is intended as a text-book for the students in the law school of the Columbian University, established at Washington under a charter from the Congress of the United States, where students from all the States are instructed, the necessity of a book on equity pleading adapted to the practice of all the States, is obvious.

This edition of Mitford is intended as the counterpart of the edition of Stephen on Common Law Pleading, which the present editor prepared, several years ago, for the students of the Columbian University Law School, as a guide on pleading in both Federal and State courts. The Code pleadings, if that which has no logical principles can be called pleadings, are ignored, as not coming within the scope of a treatise of universal application in the comprehensiveness of its principles and rules.

Such being the national view of our twofold jurisprudence, which has been taken in the preparation of the editions of Stephen on Common Law Pleading, and Mitford on Equity Pleading, it is well to consider the respective characters of common law and of equity as schemes of administrative justice; because it is the jurisprudence of a country upon which all its institutions rest for preservation.

In the Introduction to Stephen on Common Law Pleading, by the present editor, the difference between the common law of England and the civil law of ancient Rome is presented in their opposite political principles, and the different institutions that are cognate with them respectively. Free government is shown to be the outgrowth of the common law of England; and despotic



government, as in the nations of continental Europe, of the civil law, with its doctrine of imperial Cæsarism. For nationality is not more determined by peculiarity of race than it is by the character of the laws and institutions under which a people are educated and trained in the affairs of life. Such being the case, it is important to consider with which of the two great systems of law equity is most akin.

Equity has its root in the Roman civil law. The first chancellors, for ages, in England, were ecclesiastics, trained, as to legal ideas, in the civil law. And when chancellors, trained in the common law, came to administer equity, the common law judges strove to prevent encroachments by equity upon their jurisdiction, as much because of its political associations, as because of its peculiar principles and modes of judicial relief. In order to show its connection with the civil law, and also, because of the practical importance of the work as authority on equity pleading, the present editor has edited and published the *Forum Romanum* of Chief Baron Gilbert as the forerunner of this edition of Mitford. There, the connection between the equity and the civil law procedures is made manifest.

In itself, as embracing within its jurisdiction only certain classes of cases, none of which have any relation to personal liberty, equity has no bearing upon government. But as there is a strong inclination in this country to abolish the distinction between law and equity, and to introduce equity procedure as common to both law and equity, it may not be unprofitable to consider the influence of such innovation upon administrative justice, and also upon free institutions.

It is urged, as one reason why the pleadings by bill and answer, or statements, in a plain way, of their case,

by both parties, should be used as a common procedure for all cases, that it is so simple. This reason is founded upon ignorance of both common law and equity pleading. If any one, capable of appreciating the subject, will study the dissertation on pleading in equity prefixed to this edition of Mitford, he will at once perceive the extreme difficulties inherent in equity procedure, because of the exigencies of justice which must occur in making defenses in complicated equity causes, which involve so many and such various equities. Then, let him turn to Stephen on Common Law Pleading, and then to the Maryland Simplified Pleading, and strive to conceive how equity pleading is to be made as simple and, at the same time, effective in practice. It is as impossible to do so as to bring the problems of the higher mathematics within the rules and forms of common arithmetic. Equity pleading was, at first, precisely what these tamperers wish with what they do not understand wish to introduce as a scheme of pleading for both law and equity causes, in a common jurisdiction for the two classes of causes. Equity pleading was, in the beginning, a simple informal statement by each party of his case. But as equities were gradually multiplied, by judicial administration, into a comprehensive system of jurisprudence, a scheme of procedure was necessarily evolved in conducting the causes to a decision upon their merits. And thus equity pleading, as set forth by Mitford, is, in substance, the indispensable procedure, and that, too, with many of its subtleties, which the actual experience of courts, by a tentative process in conducting causes, have found necessary to bring them to a decision on their merits. Those, therefore, who wish to introduce one procedure for both law and equity causes, must learn that equity causes will require then,

as now, the scheme of pleading set forth in this volume, and law causes will be put in utter confusion. The States which have made the experiment present the pitiable spectacle of courts "in wandering mazes lost," knowing not, at times, what to do in order to conduct causes to a decision upon their merits. In a case of trade-mark, in the Superior Court of New York (2 Sandf. R. 619), Judge Duer, in his perplexity, remarked: "By our present practice, I cannot direct an action at law, to enable the complainants to establish their right; for, if I rightly understand the provisions of the Code, the present suit is such an action, and in reality, every complaint, whatever the nature of the facts set forth, or the relief sought, is at once a declaration at law and a bill in equity." And the volumes of cases on Code Practice multiply by scores, and at the same time settle nothing like a fixed procedure. Even England has taken a step towards the mire of mixed law and equity, by the "Supreme Court of Judicature Act, 1873," which was to have gone into operation on the second day of November, 1873, but was postponed to the first day of November, 1875; and on that day the new judicial system was inaugurated in Westminster Hall by Lord Chancellor Cairns and the judges. A book, "The Law and Practice of the Supreme Court of Judicature, by Wyne E. Baxter," had been already published, to prepare the way for the execution of the most important statute ever passed by the British parliament in relation to administrative justice.

This statute, while seemingly radical, to satisfy the innovating spirit of the times, is drawn with such conservative prevision, that, with a bench and a bar trained in the separate systems of law and equity, justice may, perhaps, still be kept on the old paths of administration,

with different procedures, as of old, used respectively for the special classes of cases belonging to the separate jurisdictions.

That all changes in administrative justice have more or less influence on government, is obvious to every one familiar with the history of European society in relation to constitutional law. The English constitution receives its life-blood from the common law, and is but the political organic form of its free spirit. All the guards of protection to person and to property are found in the law and its peculiar procedure. The English common law judges, therefore, and especially Coke, have been, and particularly in times of commotion, stern supporters of common law principles and processes. Any change in these long-tried processes must have bearing on government, and that for evil.

So profoundly had a comprehensive study of European history impressed the present editor with the political bearing of law reform, that, as a commissioner appointed by the Legislature of Maryland to simplify the pleading and practice in both the courts of law and of equity of the State, in his report made in January, 1855, he brought the fact before the Legislature as a reason for retaining the common law procedure, with its excrescences removed. "The agitation of law reform involves (says the Report) the very same conflict in this country which for centuries has been waged in Europe between Teutonic institutions and the institutions and laws of Imperial Rome. Everywhere an effort is making to introduce into practice the procedure of the civil law, and to abolish the distinctive character of the procedure of the common law." The Legislature adopted the views of the report; and hence the Maryland simplified pleading, retaining the distinctive features of the

common law pleading, became the law of the State. And equity pleading was retained unaltered ; as in another elaborate report it was shown that equity pleading was as simple as the exigencies of administrative justice would allow. So that law and equity were retained as mutual, but separate, systems of organic jurisprudence, administered by the same judges, sitting on both the equity side and the law side of the court, according to the nature of the case before them, and gradually adjusting law and equity more and more into co-operative relief in administrative justice.

Though the jurisdiction of equity is widening day by day (more, however, by increase of new subjects of its jurisdiction than by encroachment on the province of common law), until it would seem destined to extinguish law with its peculiar procedure as a distinct organism, yet it may be confined to its peculiar classes of cases in the future, as in the past, if the evils of the amalgamation of law and equity can be made manifest. The widening scope of equity, at the expense of common law jurisdiction, is evinced particularly in a provision in the "Supreme Court of Judicature Act, 1873," just mentioned, which declares that wherever there is any conflict or variance between the rules of equity and those of common law with reference to the same matter, the rules of equity shall prevail. This provision but embodies the principle which the common law judges have for ages adopted to ameliorate the too rigid rules of the common law. The doctrine of mortgages is one among many of the doctrines of equity which the common law courts have so wisely adopted, in their co-operation with equity courts, to make the two forms of jurisprudence a perfect scheme of administrative justice. And courts of law, by virtue of legislation, have the

power to examine the parties to suits, and thereby save suitors at law the necessity to file a bill of discovery in equity to furnish evidence in the case at law. And by many other adjustments, the most obvious objections to separation between law and equity have been removed.

There is one evil, of ruinous consequences to administrative justice, which the abolition of common law pleading with its issues, separating fact from law because of the trial of facts by jury, must produce. The law of evidence has been developed by the courts of law in trials by jury. It is an offshoot from common law pleading. The issues of fact indicate, by what is affirmed and denied in the issues, the nature of the evidence needed to prove them. And it is by their probative relations to the issues that the admissibility of facts adduced as evidence is determined by the courts. From this simple probative indication by the issues, the courts of law have evolved, and law writers have reduced to a system, the rules of evidence founded on what are called the natural principles of evidence. And these, with some rules founded on what Starkie, in his able work, illogically calls excluding principles, constitute the whole law of evidence. The law of evidence, thus built up by courts of law, has been received by the courts of equity. The civil law has no definite law of evidence, because its pleadings do not form issues separating facts from law to be tried by a jury. And the courts of equity would, for the same reason, not have a definite law of evidence, if the common law courts had not furnished them with one. On the trial of an issue of fact, separated from law, questions of evidence arise for separate and special consideration by the judges, whose province it is to determine all such questions. And it must be conceded that the procedure which has

originated the law of evidence is the best calculated to preserve it as an important element in administrative justice, in its present systematic form.

It is well for students of law to understand the relation of writers on law to the decisions of courts in forming the jurisprudence of a country, and in what sense such writers are authority in courts upon questions of law.

The jurisprudence of every country is developed by the courts in administering justice. Their decisions embody the principles of justice which are applicable to the cases brought before them for adjudication by parties who cannot adjust them themselves. And as judicial administration requires an established procedure, to make justice speedy and certain, and to present the cases in a clear and concise manner, so that the court may know what is in controversy, the courts, as incidental to their adjudications, have, from time to time, decided upon the sufficiency of the statement of complaints, and also of defenses. But this judicial development of law, contained in the cases decided and reported in a long series of volumes, leaves it a mere shapeless and unwieldy mass, both as to its principles and its procedure. Therefore a class of lawyers, many of them eminent practitioners and judges, always arise by the side of the administration of justice, who, by their writings, reduce the law embodied in the decisions of courts to a systematic form, available for practical guidance. Without these great writers, law would be all confusion. The English law, therefore, became a science by a process of generalization from usages and decisions of courts, effected by the writings of lawyers. And great writers, not only on the principles of jurisprudence contained in the decisions, but also on pro-

cedure, arise to reduce the decisions of courts on questions of pleading to a logical and coherent system. Hence was produced the great work of Mitford on Equity Pleading. Courts are of only a little more, if any, importance in the administration of justice than these great text writers are as guides, not only to students and lawyers, but also to the judges. That two works, Stephen on Common Law Pleading, and Mitford on Equity Pleading, written by two of the greatest juridical thinkers in the history of jurisprudence, after being sure guides for so long a period in England and in this country, should still be followed, seems to be the decision of experience. The works of great law writers are recognized authority as critical exponents of the principles which have been established by judicial decisions. Courts are not, by any juridical rule, obliged to follow the opinion of any text writer, as they are a judicial precedent, but only to yield assent to it as a true exposition of the law.

The excellence ascribed, in the preceding remarks, to equity pleading is said of it solely as applied to suits of hostile litigation. There is a large class of suits, which may be called administrative, to which such pleading, as well as the regular practice in equity, is not appropriate, in the majority of cases ; yet some such cases do require to be conducted under the ordinary procedure.

The administrative jurisdiction of the Court of Chancery is that branch of the jurisdiction which has to adjust and administer doubtful or recognized rights, rather than to decide between directly hostile litigants. It ascertains, secures and applies property for the benefit of its rightful owners, according to their respective rights, which may or may not have already been decided in hostile litigation between adverse claimants. On the



one hand, whatever property ought of right to be dealt with in any particular case is ascertained, got in and permanently secured under the orders of the court; while, on the other, all claims upon and all interests in that property, whether contested or not (if made *under* and not *adverse* to the administration), are ascertained and declared, and put in train for liquidation. Immediate and vested demands are at once satisfied; future and contingent claims, and continuing interests of whatever duration, are provided for and administered during the whole of their continuance: and ultimately, on the determination of all charges and contingencies, the entire matter is completely wound up and settled. Such is the *administrative* jurisdiction of the Court of Chancery, as distinguished from the ordinary *contentious* jurisdiction under which litigated rights are, once for all, adjudged and settled.

It must not, however, be supposed that the Court of Chancery, in its administrative jurisdiction, exercises any single branch only of its authority. It is the application by the court of certain parts of its peculiar jurisdiction and machinery, as, in particular, its jurisdiction in the matter of discovery, accounts, inquiries, and other proceedings in chambers, to the enforcement and execution of a trust, or of some other similar relation and liability, as, for instance, the relation and liability of an executor to the creditors of a testator, and to his devisees or legatees, so as to work out the whole matter in all its ramifications and details. (See Haddan's Equity Jurisdiction, p. 6.)

To this class of cases belong especially proceedings to sell the real estate of infants, when it is to their interest and advantage, or to mortgage the estate for the purpose of raising money to pay off any charges or liens

upon it, or to demise it, or to exchange it—a jurisdiction which courts of equity have more or less everywhere acquired by legislation in aid of their general guardianship over infants and their property.

But the most important of this class of cases is the administration of a deceased person's assets. According to the ancient and regular course of the Court of Chancery, a decree for accounts, with a view to the administration of the estate of a deceased person, against his executor or administrator, could be obtained only in a suit regularly instituted on a bill filed, answer put in, and case admitted or proved by evidence in due form after the cause was at issue ; just as in the case of a decree for any other purpose in the most hostile or complicated case. And by the ancient procedure, the same formal course is required for the administration of trusts, the next most important cases belonging to the administrative jurisdiction of chancery.

In mere administrative cases, courts of equity should have authority to use a summary proceeding by petition and affidavits, instead of proceeding by a regular suit in equity. And this is the course that reform in equity procedure is taking both in England and in this country. The British Commissioners, in their report on the process, practice, and pleadings in chancery, made in 1852, say : “ But the last and greatest change in chancery procedure is that introduced by the General Orders of Lord Cottenham, of April, 1850. By these, in a great number of special cases, without any formal pleadings at all, by the filing of what is called a claim, heard summarily on affidavits, and, if necessary, on counter affidavits, the court is enabled at once to pronounce a decree between the parties. Besides the specified cases, the court is au-

thorized, in every case in which it thinks fit, to permit a claim to be filed. The extent to which this new system has been used is shown by the number of claims filed. The order came into operation on the 22d of May, 1850, between which time and the 12th of January, 1852, 1,969 claims have been filed, in almost every variety of case; upon these, 863 decrees or orders have been drawn up, and 245 stand in the list for hearing. Of the remaining number, by far the greater proportion have been disposed of by compromise or otherwise. Some few are not yet set down to be heard. In a small number of the cases heard, the court has felt itself unable to deal satisfactorily with the matter by way of claim, and has left the parties to proceed by bill."

"We are of opinion that the proper progress of chancery reform is in the same direction, that is to say, to substitute, in every case which admits of it, the shortest and most summary process, with the least amount of preliminary written pleadings; and to bring the parties, by themselves or their counsel, to state their cases with as little delay as possible to the tribunal which has to decide."

The procedure by claim or petition for the administration of the estate of a deceased person was introduced into English chancery practice by the General Orders of Lord Cottenham, in 1850. But, in 1852, by Act of Parliament, 15 & 16 Vict. c. 86, a simple "*summons*" in the chambers of the judge was substituted for the machinery of bill and answer; and authority was given to the judge, on this summons, to make the same "*usual administration decree*," which, in like circumstances, the court might have made in a suit regularly instituted by bill.

But all these changes proved unsatisfactory ; and Parliament, in 1873, passed, as a remedy for all evils in administrative justice, the " Supreme Court of Judicature Act," already noticed. It remains for the practice of the judicial system organized under it to test its efficacy.

As, in the United States, both in the Federal courts and in the courts of some of the States, the jurisdiction of equity is still separate from that of law, regular equity procedure is as important, as a means of administering equity, as in past times. And as it appears from the report of the British Commissioners in 1852, already noticed, that the courts, in cases which seemed, at first view, to admit of the summary proceeding by *claim*, found themselves unable to deal satisfactorily with the matter in controversy, and had to leave the parties to proceed by bill, the excellence of the long-tried equity procedure, in all cases of hostile litigation, and in even administrative cases involving various and numerous parties, is fully vindicated.

And there is nothing which discloses so accurately the minute distinctions and refinements of equity doctrines met with in actual practice, as a critical study of the general framework and nice structural adaptations of the various forms in regular equity procedure. These forms embody equity in its practical applications to the exigencies of justice. It was out of the exigencies of practice that they arose ; and to throw aside such admirable guides in working out the details of practice, and leaving lawyers and judges to their own wits, must lead to a most inadequate administration of justice.

NOTE.—As there is an epidemic hostility against law and equity, as separate systems, it is well to refer to what is said by Mr. Austin, in “The Province of Jurisprudence Determined,” on the subject, as he is recognized as high authority for the fusion of law and equity into one system of jurisprudence :

“ Having sketched (says he) an historical outline of the *jus prætorium* (which is intimately connected with the *jus gentium*, as this last was understood by the earlier Roman lawyers), we shall briefly compare the equity dispensed by the Roman prætors with the equity administered by the English chancellors ; from which brief comparison, it will amply appear, that the distinction of positive law into law and equity (or *jus civile* and *jus prætorium*) arose in the Roman, and also in the English nation, from circumstances purely anomalous, or peculiar to the particular community ; and from which brief comparison it will also amply appear that the distinction is utterly senseless when tried by general principles, and is one prolific source of the needless and vicious complexness which disgraces the systems of jurisprudence wherein the distinction obtains.” This criticism by Mr. Austin is itself “utterly senseless,” when tried by the fact that the distinction between law and equity is one in a scheme of practical justice adapted to two different classes of causes of litigation, which differ, not in their relations to principles of justice, but in relation to the procedures that are best for applying those principles to the two different classes of causes. The principles of justice are the same at law and in equity, but are applied by different procedures, because of the different practical exigencies of justice, which arise from the inherent and unalterable differences in suits at law and suits in equity. Mr. Austin was not competent to judge of the wisdom of the distinctions in practical justice. As a practitioner in a court of justice, whether of law or equity, his speculative jurisprudence would place him in a like rank of incompetents with pettifoggers. If, like Bacon, he could fully appreciate the practical in human affairs, and especially in jurisprudence, he would have written with more wisdom, and less assumption of superiority.

## OF PARTIES TO SUITS IN EQUITY.

BY SAMUEL TYLER.

IN order to give effect to the comprehensive remedial justice administered by a court of equity, every person interested either directly or collaterally in the matter in controversy, and whether his interest is exclusive and absolute, or merely conditional, can, by its commodious scheme of procedure, be a party to a suit, in order that the decision may provide for the rights of all persons interested. This makes the doctrine of parties to a suit in equity very complex and difficult. (Story's Equi. Juspr. c. 1, sec. 28.)

All persons interested in the matter of the suit should be parties. For the rights of no one, however remote or conditional or direct, can be affected by a decree in equity, unless he be a party to the suit, or claims under a party to the suit; and his rights will, unless he be a party or claims under a party, remain precisely as if no suit had been instituted. Therefore, *who should be parties to a suit in equity*, is a question of the first importance, in order, when the final decree is passed, the rights of all persons interested in the matter of the suit will be settled, and all further litigation prevented, and the performance of the decree of the court be perfectly safe to those who are compelled to obey it. (Cooper's Equity Pleading, 33.) And it is a question of importance *who should not be parties to a suit in equity*.

There are two classes of parties, complainants and defendants, in suits in equity, as there are in suits at law. The complainants are the persons who pray relief in the bill. The defendants are the persons against whom process is prayed. It is not sufficient that a person be mentioned as a defendant, process must be actually prayed against him. (1 Peere Wm. 592, anno 1717; 2 Dick. 707, anno 1788.) If a defendant is within the jurisdiction of the court, the prayer must be for immediate process; if he is not within the jurisdiction, the prayer must be for process when he comes within the jurisdiction. Before a decree is made against a person, he must be served with process (5 Bro. P. C. 498, anno 1717), of subpoena, or other process which may prevail in some courts.

It is not necessary in suits in equity, as it is in suits at law, that all the complainants shall have one interest, and all the defendants an opposite one. It is true that all persons having the same interest should stand on the same side of the suit in equity. But if any such refuse to appear as complainants, they may be made defendants. (2 Bland, 264, 292.) Often, so far as the right to sue is concerned, the defendants could have been complainants, and the complainants could have been made defendants; as, for example, in a suit for partition of land between joint owners. Whether a party is complainant or defendant is determined by the side of the suit on which he stands, and not by the rights he has in the controversy. Sometimes the rights of some of the defendants may be identical with those of the complainants. Therefore, there is not always a conflict of rights between complainants and defendants in equity, as is always the case between plaintiffs

and defendants in law. In equity it is only requisite that the interests of the complainants be consistent; and it is immaterial that the defendants are in conflict with each other, or that the claims of some of them are identical with those of the complainant. But it should be observed that, although a conflict of interests among the defendants is no objection to a suit in equity, yet it does not follow that the court will adjudicate and settle their conflicting claims. The court will do so only when it is necessary to settle their conflicting claims in order to determine the rights of the complainants. (Adams' Equity, 608, 5 Am. ed.) If there be no necessity for it involved in the settlement of the complainant's claim, the court of equity will not adjudicate between codefendants.

If the claims of the complainants are inconsistent, or if any of the complainants have no claim, the misjoinder will be fatal to the suit. It is not, however, necessary, in order to join in a bill in equity, that the complainants should have a joint interest. Unconnected parties having a common interest in the matter in controversy may unite in the same bill; as where there is a common fund for distribution, parties having separate claims to portions of the fund can be joined.

Courts of equity exercise a judicial discretion over the matter of parties to a suit. It is a question of policy as well as of jurisdiction. As early as 1812, the Supreme Court of the United States, because of the limited jurisdiction territorially of the Circuit Courts, they not being competent to proceed against any person not residing within the district for which the Circuit Court was held, though residing within the United States, declared that it would certainly justify them in dispensing with parties merely formal. And that, per-



haps, when the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree as between the parties before them. But where the parties are so essential to the merits of the question, and may be so much affected by the decree that the court cannot proceed to a final decision of the cause till they are parties, the court cannot decree. (7 Cranch R. 98.) And in 1825, in a case in 10 Wheaton's Reports (166, 167), the court said, to an objection for want of parties, "This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require that all parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule; however, is framed by the court itself, and is subject to its discretion. It is not like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his case; but being introduced by the court itself for the purposes of justice, it is susceptible of modification for the promotion of those purposes."

In 1827, in a case in 12 Wheaton's Reports, 98, where an indispensable party was not before the court, the court said, "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." And in a case in 1833 (7 Peters R. 263), the court said, "It is the settled practice of the courts of the United States, if the case can be decided on its merits

between those who are regularly before them, to decree as between them. Although other persons not within their jurisdiction may be collaterally or incidentally concerned, who must have been made parties had they been amenable to its process, this circumstance shall not expel others who have a constitutional right to submit their case to a court of the United States, provided the decree may be made without affecting those interests."

In 1839 an Act of Congress was passed relative to the non-joinder of parties to a suit in equity who cannot be reached by process of the court, which was only legislative affirmance of the rules which had been established by the decisions of the Supreme Court. This construction was given to the act, in 1855, in a case (17 Howard R. 141), by the Supreme Court, in which the court said, "A Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

These decisions recognize a distinction, as to the joinder of parties in a suit in equity, between *nominal*, *necessary or proper*, and *indispensable* parties. A nominal party is one, joined for sake of conformity in the bill, having no interest, legal or equitable, to be affected by the suit. A necessary party is one who has an interest in the matter in controversy, and should be made a party to enable the court to do complete justice by adjusting all the rights involved, and must be made a party if within reach of the process of the court; still, if his interest is separate from those before the court he is not an indispensable party. An indis-

pensable party is one where a decree cannot be made without affecting his interest. (See 1 McAllister R. 31, 37.)

Where persons interested are out of the jurisdiction of the court, it is sufficient to state the fact in the bill, and to pray that process may issue on their return ; and if the statement be proved at the hearing, their appearance will be dispensed with. But whether the court can decree in their absence, depends on the nature of their interest, and the manner in which it will be affected by the decree. If they are to be active in performing the decree, or if they have rights entirely distinct from those of the other parties, the court cannot, in their absence, decree against them. But if they are only passive objects of the decree, or their rights are merely incidental to those of the parties before the court, a complete adjudication can be made in their absence.

The rules prescribed by the Supreme Court of the United States, in regard to parties in a suit in equity will be found in the Appendix to this volume, containing "Rules of Practice for the Courts of Equity of the United States."

In the several States in which there are courts of equity, there are statutory regulations making proceedings in courts of equity effectual against parties out of the reach of their process, bringing them constructively before the court by means of advertisement, in newspapers, of the character and pendency of the suit. As to making absent parties defendants by publication, see 3 Dana, 306 ; 5 J. J. Marsh. 513. There must, to make defendants, be actual or constructive service of process. Without prayer and service of process, the mere naming of persons as defendants does not make them such. (2 A. K. Marsh. 497 ; 3 Dana, 306.)

Courts of equity, in applying the general principle in regard to parties to a suit, never allow it to produce an inconvenience, in the adjustment of rights, which can safely be avoided. With this view, they have established a rule founded upon the doctrine of representation. It sometimes happens that compliance with the principle which requires the joinder in a suit in equity of all parties interested in the matter in controversy is practically impossible, because the persons interested are too indefinite or too numerous to be individually joined in the suit. In such case, the principle in its application is modified upon the doctrine of representation, so that one or more members of a class may sue or be sued on behalf of the whole, provided the interest of every absent member in the claim made or resisted is identical with that of those who are personally before the court. (1 Danl. Ch. Prac. 191, 4th Am. ed.; Adams' Equity, 621, 5th Am. ed.)

The most ordinary instances of representation are in suits by creditors or legatees. For as a single creditor or legatee may sue for his demand out of the personal assets, without bringing the others before the court, it is rather matter of convenience than of indulgence to permit a suit by a few on behalf of all; and it tends to prevent several suits by several creditors or legatees, which would be inconvenient in the administration and burdensome on the fund administered. The rule, however, is not confined to cases of this class, but has been extended to other cases where several persons have distinct rights on a common fund, as creditors under a trust deed, residuary legatees, or next of kin; and in such cases, if the parties are very numerous, one has been allowed to sue on behalf of all, although he could have sued for his separate share with-

out bringing the others before the court. The ground for this indulgence is that if all were made actual parties, the suit would be liable to frequent abatements, and it would be practically impossible to bring it to a hearing. The court, however, in such cases will not proceed to a decree until it is satisfied that the interests of all are fairly represented, and that there would be a preponderating inconvenience in bringing them individually before the court.

The same principle applies where there is a common right against the defendants. As where the associates or shareholders of a private association are numerous, a bill may be filed by one of such associates on behalf of himself and the others against the trustees of such association to compel the execution of the trust, and for an account and distribution of the funds and property of the association among the shareholders. It is not necessary that all the associates or shareholders should unite in a bill for that purpose. But the other associates or shareholders must be made parties defendant, unless the suit expressly profess to be as well in their behalf as that of the complainants.

Upon the same principle on which plaintiffs are permitted to sue on behalf of others as well as themselves, suits may be allowed against persons as defendants on behalf of themselves and others. But the rights of all must be fairly before the court. Where all the defendants have but one right amongst them, founded upon the same circumstances, a few may be sued, because the rights of all would be thereby sufficiently represented, and the question as to all satisfactorily tried. But where there are several different rights under which the claim of the plaintiff may be resisted, there must be a corresponding number of persons sued, who may

maintain all the several defenses. The bill must state that those sued are sued as well on behalf of all the others as themselves. (Calvert on Parties, 2d ed. pp. 44-48.)

The rule requiring the joinder of parties for the protection of their interests is still further modified in its application to defendants. As a tenant in tail might at any moment destroy the remainders, and make himself master of the entire estate, he alone is assumed to represent the inheritance, and to offer satisfactory defense of all subsequent interests. "A court of equity (says Lord Eldon, 9 Ves. 65, anno 1803) in many cases considers the tenant in tail as having the whole estate vested in him, at least for the purposes of suit; and for these purposes does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land." And as early as anno 1769 (Ambl. 564) Lord Camden said: "In the foreclosure of mortgages, the first tenant in tail is sufficient; he sustains the interests of everybody; those in remainder were considered as cyphers." Therefore, only the person owning the first inheritance need be a party to a suit, as he represents all persons who are entitled to subsequent estates.

And the principle of representation is extended to a tenant for life, where there is no person in existence entitled to an estate of inheritance. In such case it is sufficient to sue the existing tenant for life. In 1 Sch. & Lef. 407, 408, anno 1804, Lord Redesdale said: "It is sufficient to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person, then the tenant for life; and courts of equity constantly act, on these parties being before the court, in everything relating to the whole estate. \* \* \*

It has been repeatedly determined that, if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred; this is now considered the settled rule of courts of equity, and of necessity." (See 1 Eq. Ca. Ab. 400, anno 1700; 2 Vern. 527, anno 1705.)

The same modification of the principle requiring all persons in interest to be made parties, is extended to legatees and next of kin, in suits for a debt or legacy against the personal representative. In such cases, like the general creditors, who cannot be made parties, they are interested that the assets be not diminished in sufficiency to pay their claims, but the personal representative represents the personal estate, and they have no interest in the object of the suit, and therefore cannot be made parties. If, however, they are not common legatees, payable by the executor out of the general fund, but are specific owners of the property itself, they should be made parties. A residuary legatee is not a necessary party to a suit seeking to charge the general assets. (2 How. U. S. 575.)

Having considered the general principle requiring all persons interested in a suit in equity to be made parties, it becomes necessary to inquire what is meant by interest in a suit in equity. Because, unless the nature of the interest is definitely comprehended, the pleader cannot know who are really interested according to the meaning of the principle. And there is nothing which has been written upon the subject, and nothing, perhaps, which will be written upon it, that can discuss the matter more definitely and more upon judicial authority, than the treatment of the topic by Calvert, in the first chapter of his "Treatise upon the Law

respecting Parties to Suits in Equity," embraced in the following extracts from the first edition of the treatise.

"Courts of equity adopt two leading principles for determining the proper parties to a suit. One of them is a principle admitted in all courts upon questions affecting the suitor's person and liberty, as well as his property, namely, that the rights of no man shall be decided in a court of justice unless he be present.

"The second is a principle which, in this country, is peculiar to courts of equity, namely, that when a decision is made upon any particular subject-matter, it shall provide for the rights of all persons whose interests are immediately connected with it. \* \* \* \*

"The combination of the two principles which have been mentioned has given rise to the general rule upon the proper parties to a suit in equity. This rule has been laid down by different writers and judges in very different expressions. Lord Redesdale says, 'For this purpose, *all persons materially interested* in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of *all persons interested*, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigation may be prevented.' Lord Hardwicke (*Poone v. Clark*, 2 Atk. 515, anno 1742) says, 'The general rule is, that if you draw the jurisdiction out of a court of law, you must have all persons parties before this court who will be *necessary to make the determination complete*, and quiet the question.' Lord Thurlow says (*Anon.* 1 Ves. Jr. 29, anno, 1789), 'All parties having an *apparent* right must be brought into court before the court will do anything which may



affect their right.' Sir William Grant says, 'As far as it is possible, the court endeavors to make a complete decree that shall embrace the whole subject, and determine upon *all parties interested in the estate*.' (Palk v. Clinton, 12 Ves. 58, anno 1806.) Lord Eldon says, 'The strict rule is, that all persons *materially interested in the subject* of the suit, however numerous, ought to be parties, that there may be a complete decree between all parties having *material* interests. (Cockburn v. Thompson, 16 Ves. 325, anno 1809.) Sir William Grant again says (Wilkins v. Fry, 1 Mer. 262, anno 1816), 'In equity it is sufficient that all parties *interested in the subject* of the suit should be before the court, either in the shape of plaintiffs or defendants.'

"The object of quoting so many authorities for the general rule is not merely to show how universally it has been acknowledged, but still more to call attention to the vague language in which it has been expressed by very logical reasoners. Lord Redesdale has qualified the rule which he laid down, in these words (Red. Pl. 170): 'In many cases, the expression that all persons interested in the subject must be parties to a suit is not to be understood as extending to all persons who may be *consequentially* interested.' Yet if Lord Redesdale's rule, even in company with this qualification, were to be adopted as a guide for practice, it would frequently lead to inferences which are at variance with decisions acknowledged to be correct. For instance, a remainder-man in fee after an estate tail is (Cockburn v. Thompson, 16 Ves. 326) not to be made a party to a suit in which the title to the estate is determined, though one who claims an interest only for life, antecedent to the estate tail, must be made a party. A person who possesses either of

these two characters is 'a person interested,' and 'materially interested;' nor is there any meaning in the term 'consequentially,' which applies to the former, and not to the latter.

"If a creditor (*Lawson v. Baker*, 1 Bro. C. C. 302, anno 1783) sues for payment of his debt, it is clear that the residuary legatees are interested in resisting the claim; for if the resistance to the debt is successful, their shares of the residue will be increased. Yet it is not necessary to join them as parties with the executors. A residuary legatee, or in case no residuary legatee is appointed, a next of kin appears to have precisely the same degree of interest in opposing a suit to establish a legacy, as an heir at law has in opposing a suit to establish a devise; the interest of the one is no more 'consequential' than the interest of the other. Yet the heir at law is a necessary party in one suit; and the next of kin, or residuary legatee, is not a necessary party in the other.

"Such being the indefinite character of the rule, according to the terms in which it has been laid down by high authority, it might be at first inferred that the nature of the subject would not admit of any more precise expression; and the same inference might follow from a merely cursory observation of the decided cases. It must, however, be observed that the object at which judges have aimed, in giving their judgments, has been to lay down the rule with sufficient accuracy for the case immediately before them, and that they have not attempted to pronounce a general rule applicable to all cases. They might have had in their minds a precise idea of the general principle, although they did not express it precisely. An attempt will now be made to ascertain the precise

nature of that principle, and to express the rule in such language as may be sufficiently definite to serve as a guide upon all occasions.

“ Lords Eldon and Thurlow and Sir William Grant mention as necessary parties all persons interested in the *subject* of suit. The expression ‘subject of suit’ may mean one of two things, either the fund or estate respecting which the question at issue has arisen, or else that question itself. For instance, in a foreclosure suit, it may mean either, in the first sense, the mortgage debt or mortgaged premises; or else, in the second sense, the question whether a foreclosure ought or ought not to take place. In the passage which has been quoted from the case of *Palk v. Clinton*, it is clear that Sir W. Grant used it in the first sense. Lord Eldon, in the case of *Cockburn v. Thompson* (16 Ves. 326, anno 1808) appears to have used the words in the same sense; for, in further explanation of the general rule, he says: ‘Accordingly, there are several well-known cases of exception; and, without going through with them all, I will mention one instance of not applying it to persons *having valuable interests in real estate*; namely, where it has been held sufficient to bring before the court the first person having an estate of inheritance; though it cannot be denied that persons having present immediate valuable *interests in the same real estate*, may become most deeply affected by what is done here in their absence.’ The sense in which Lord Thurlow used the term cannot be ascertained from Mr. Vesey’s very brief (1 Ves. Jr. 29, anno 1789) report of the anonymous case which has been quoted.

“ If the words ‘subject of suit’ were taken in that very extensive meaning in which Lord Eldon and

Sir W. Grant used them, the general rule, as laid down by them, would be inconsistent with several decisions which are firmly established. For instance, if there is a contract to sell an estate, which the vendor claims under a will, the purchaser filing his bill for specific performance of the contract, need not make the heir a party if he does not pray for proof of the will; but if he does, he must make him a party. Yet the interest of the heir in the estate, that is, according to Lord Eldon's and Sir W. Grant's use of the term, in *the subject of the suit*, cannot be at all varied by the insertion of such a prayer. The executor of a mortgagor has neither greater nor less interest in the estate mortgaged, whether the prayer of the mortgagee's bill is for a sale or for a foreclosure; yet if it is only for a foreclosure, he is not necessarily a party; but he is, if the prayer is for a sale. When a lessee of tithes institutes a suit respecting them, the lessor is not a requisite party, unless the prayer is in part for the establishment of the right to tithes; although he is, of course, equally interested in the tithes themselves, whether such a prayer is or is not introduced into the bill.

"Many cases may be mentioned which show that according to general practice, a mere interest in the *subject of suit*, as the term was used by Lord Eldon and Sir W. Grant in the passages quoted above, is not sufficient to render a person a necessary party. The cases of *Saville v. Tancred* and *Franco v. Franco* are inserted here as examples of such cases.

"*Saville* (1 Vcs. 101, anno 1748), pawnee of a strong box containing jewels which belonged to the Duke of Devonshire, filed a bill against *Tancred*, in whose custody it was, to compel him to deliver it up, and to give an account. An objection was made that the duke's

representative should have been made a party; but Lord Hardwicke 'overruled the objection; for pawnee of a pledge, as Saville was, may bring trover or detinue at law for it, without troubling himself with the pawner; for he has a special property. But suppose he was not pawnee, but had only the possession of them, and delivered them to another; that person has nothing to do with the duke. Therefore, let these jewels come into his hands which way they will, he may give the custody of them to any one, and have them back without hurting the duke or his representative.'

"In *Franco v. Franco* (3 Ves. Jr. 75, anno 1796) the plaintiff, a trustee, had, at the request of his cotrustee the defendant, transferred the trust fund into his own name. The bill prayed, amongst other things, that the defendant might be decreed to replace the fund, and it was contended, on demurrer, that the *cestuis que trust* ought to have been parties; but Lord Loughborough said, 'This is no bill for execution of a trust. Whatever the *cestuis que trust* would have, they could never found themselves upon the case the present plaintiff makes against the defendant,' and overruled the demurrer. It need hardly be remarked that in *Saville v. Tancred* the Duke of Devonshire was interested in the jewels, and that in *Franco v. Franco* the *cestuis que trust* were interested in the stock.

"In cases concerning trust property it is particularly necessary to pay attention to the correct rule; for the *cestuis que trust* are always the persons interested in the subject of the suit, and yet they are very frequently not to be introduced among the parties. Where, for instance, there are trustees to sell an estate, receive the purchase money, and pay it to particular individuals, if the mere object of the suit is to get into the hands

of the trustee the property which is to be enjoyed by the *cestuis que trust*, the latter need not be made parties; and the reason seems to be that their equitable rights remain in precisely the same situation, whether the trustees are successful or unsuccessful in their suit. Yet it is quite clear that they would be necessary parties, if all were so considered who are interested in the *subject* of the suit, according to the meaning of the term 'subject' which has been referred to.

"The rule, then, which has been stated in these cases with reference to the subject of the suit, meaning thereby the estate or fund on which the question at issue has arisen, does not appear to be adapted to general application. It must be taken in connection with other authorities which will now be quoted.

"In *King v. Martin* (2 Ves. 643, anno 1795), Lord Loughborough says, 'There is no pretense for demurrer. This is a bill stating a case for relief, a case of confederacy between the defendants; and the material party, and *against whom a decree might be made*, not perhaps for the specific relief prayed by this bill, is the bankrupt who has demurred. The case of making a witness to a will a defendant, to know what he will say when he comes to support the will, is perfectly different; but if it was a case in which a will was impeached as obtained by fraudulent practices, the witnesses are proper parties. Lord Eldon says, in *Fenton v. Hughes* (7 Ves. 288, anno 1802), 'It is admitted that it is impossible to file a bill against a person who is a mere witness, if the object of the bill is to have relief in equity. That this is established by a great variety of authorities.' The general effect of this decision is said by Sir T. Plumer, in *Whitworth v. Davis* (7 Ves. & B. 550, anno 1813), to be 'that a person who has no inter-

est, and is a mere witness, *against whom there can be no relief*, ought not to be made a party.' Sir John Leach says, in *Smith v. Snow* (3 Madd. 10, anno 1818), 'Persons not interested in the *suit* cannot be made parties, and it is sufficient to say that it is not alleged that these defendants have any interest in the *suit*.' And again, in *Lloyd v. Lander* (5 Madd. 289, anno 1821), speaking of a bankrupt, he says, '*Having thus neither interest nor power in the subject of the suit, which requires to be bound by the decree of the court*, it is difficult to conceive any principle upon which he can be considered as a necessary party.' The *dicta* which have been last quoted coincide with the opinion of Lord Hardwicke in *Poore v. Clark* (2 Atk. 515, anno 1742), when he made the criterion to be, 'what persons are necessary to make the determination complete, and to quiet *the question*.' So Lord Lyndhurst says, in his judgment upon the case of *Small v. Attwood* (Younge, 458, anno 1832), 'The general rule is, that all persons who are interested in the *question* must be parties to a suit instituted in a court of equity.' A similar principle is expressed in Comyn's Digest, title Chancery, E, 2, namely, that 'all concerned in the *demand* ought to be made parties in equity.' Not all concerned in the subject-matter respecting which a thing is demanded, but all concerned in the very *thing which is demanded*, the *matter petitioned for* in the prayer of the bill, in other words, the *object of the suit*. The same remark applies to all the authorities which have just been quoted. They make the propriety of a person being made a party depend upon his interest, not in the subject-matter, but in the object of the suit.

"If this distinction between the meaning of 'the subject of a suit,' and that of 'the object of a suit,' is

borne in mind, it may appear superfluous to show by other authorities, that the word 'interest,' when used as a criterion of the proper parties to a suit, means interest in its object, and not interest in its subject-matter. Still, as the word seems to have been loosely employed in the opinions which were quoted in the first instance, and as the correct interpretation of it may be the key to many difficulties which arise respecting parties, no apology will be required for mentioning the interpretation of the word which has appeared in a work recently published by Mr. Wigram.

"In the following passages he is ascertaining what are the documents which a plaintiff may compel a defendant to produce. 'The plaintiff (Points on the Law of Discovery. By James Wigram, K. 6, p. 199) must show that he has an interest in the documents, the production of which he seeks. There can be no objection to this mode of expressing the rule, provided the sense in which the word *interest* is used be accurately defined. But without such definition it is obvious that this mode of expressing the rule is unprofitable for instruction. The word *interest* must here be understood with reference to the subject-matter to which it is applied. \* \* \* The word *interest* must, therefore, in these cases, be understood to mean—an interest in the production of a document for *that specific purpose*. \* \* \* Unless the meaning of the word *interest* be limited in the way pointed out, it is obvious that the effect of a single claim (perhaps without a shadow of interest), would be to open every muniment-room in the kingdom, and every merchant's accounts, and every man's private papers, to the inspection of the merely curious.' In perfect keeping with these remarks, is Mr. Wigram's explanation of the word *material*, when it is said that



the plaintiff has a right to the discovery of all matters which are material to his *case*. 'The word *material* (Points on the Law of Discovery, p. 65) is relative—material with reference to the purpose for which discovery is given—*i. e.*, material with reference to the plaintiff's case. Now, the plaintiff's case (in the sense in which the words are here used), is that case upon which the parties are about to go to trial.' Mr. Wigram afterwards quotes a passage from Lord Redesdale, in which, stating the general right of a plaintiff to a discovery of the matters alleged in the bill, he says, 'provided they are necessary to ascertain certain facts material to the merits of his case, and to enable him to obtain a decree.' These passages are the more important in confirming the rule upon parties which will be proposed, as there is a strict analogy between the purpose for which parties are made, and that for which discovery is given. 'The purpose (says Mr. Wigram, *Ibid.* p. 200) for which discovery is given, is simply and exclusively to aid the plaintiff on the trial of an issue between himself and the defendant.' So the purpose for which parties are made, is to enable the plaintiff to bring that issue to trial. Therefore the rule upon discoveries to be made, and upon parties to be brought into court, ought to be founded upon the same principle.

"Upon the consideration of all the authorities, it is proposed to state the general rule in the following words: *All persons having an interest in the object of the suit ought to be made parties.*"

This analysis by Calvert, of the judgments of courts, evolves with much definiteness the considerations by which the interest a person must have, to make him a party to a suit in equity, should be determined. It sets

up, as the test of the question in regard to parties, interest in the object of the suit or relief sought, excluding any consideration of the *subject* of the suit. This is too one-sided a view of the question. While it may perhaps be true that the *object* would be a more exact and comprehensive test than the *subject* of the suit, if we make either the exclusive test, yet the two, as constituting the topics to be considered in the question of interest, constitute a better test than either separately. Nevertheless, Calvert's analysis gives a better view of the question than any of the authorities quoted by him. A more exact and complete general rule is: "*All persons having an interest in both the subject and the object of the suit, and all persons against whom relief must be obtained in order to accomplish the object of the suit, should be made parties.*"\*

Looking back over what has thus far been written, in regard to the question of parties to suits in equity, including the extracts from Calvert, it will be seen that the chronology of the successive decisions of courts on the question is presented. This is done, in order to show the gradual and tentative manner in which the doctrines and rules have, from time to time, been evolved by courts out of cases as they came before them for adjudication, each case being decided, in relation to parties, upon its own special circumstances. Yet, as ethical rules are universal in application, and the decisions of courts of equity in regard to parties only accommodate these rules to the requirements of justice with its varying circumstances, it will be discov-

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\* Calvert, in the 2d ed. (1847) of his treatise, gives the rule: *All persons who have in the object or objects of the suit an interest or interests apparent upon the record, are necessary parties.* This enunciation of the rule is no improvement on the first.

ered that there is a doctrinal affinity and logical coherency, founded on the principle that all persons in interest should be parties, that combine the doctrines and the rules into a definite system, accommodated to the behests of administrative justice, within equity jurisdiction.

In order to understand the practical significance of the doctrines and rules which have been expounded, it is necessary to illustrate them by examples of cases belonging to equity jurisdiction. This will now be done.

The illustration of the fundamental principle relative to making parties to a suit in equity, given by Lord Chief Baron Gilbert, in his "*Forum Romanum*," 157, 158, published anno 1758, is an excellent introduction to examples illustrative of the subject: "Where a man seeks for an account of the profits or a sale of real estate, and it appears, upon the pleadings, that the defendant is only a tenant for life, and consequently the tenant in tail cannot be bound by the decree; and where one legatee brings a bill against an executor, and there are many other legatees (none of which will be bound either by the decree or by an account to be taken of the testator's assets), and each of these legatees may draw the account in question over again at their leisure; or where several persons are entitled, as next of kin under the statute of distributions, and only one of them is brought on to a hearing; or where a man is entitled to the surplus of an estate, under a will, after payment of debts, and is not brought on; or where the real estate is to be sold under a will, and the heir at law is not brought on; in these, and all other cases, where the decree cannot be made uniform; for, as on the one hand they will take care that the de-

fendant is not doubly vexed, he shall not be left under precarious circumstances because of the plaintiff, who might have made proper parties at first, and whose fault it was that it was not so done."

This view of the principle upon which parties to suits in equity are made, presented by Chief Baron Gilbert, is widened and enhanced by the case of a mortgage in fee made to secure a debt by bond, and the mortgagee dies. In such case the heir is the sole party entitled, at law, to sue the mortgagor for the possession of the land; and the executor or administrator is the sole party entitled, at law, to sue for the debt on the bond. They cannot join in one suit their respective claims. But in a suit in equity to compel payment of the debt or a foreclosure of the mortgage, they may be joined. For, though the executor or administrator is deemed in equity the sole party entitled to the debt, and therefore entitled also to sue upon the mortgage for a foreclosure, yet he may not sue alone; but he will be compelled to join the heir, either as a complainant or as a codefendant, because the mortgagor is entitled, upon payment of the debt, to have a reconveyance of the estate, and this can be made only by the heir in whom the estate is then vested. The heir is treated as a trustee of the executor or administrator until the debt is paid, and when it is paid he is treated as a trustee of the mortgagor. In order, therefore, to avoid circuity of action and multiplicity of suits, equity requires both the heir and executor or administrator to be joined in the same suit, in order that all rights in the transaction may be bound by the decree and complete justice be done. (Calvert on Parties, 2.) The principle is, that in cases which affect personalty as well as realty, the heir must be joined with the personal rep-

representative. (*Ashurst v. Eyres*, 3 Atk. 341, anno 1740; *Calvert on Parties*, 166.) And as a further illustration of the rule—where the ancestor has entered into a covenant to do certain acts, and bound himself and his heirs to the performance of them, if he should die, and a bill in equity be brought against the heir alone to compel a performance of the covenant, the court of equity would require the executor or administrator of the ancestor to be made a party. Because, if the executor or administrator had assets, the heir would be entitled, upon another bill against him, to be reimbursed out of the personal assets. But, by uniting the heir and the executor or administrator in the same bill, the court could, at once, do complete justice between all the parties, by decreeing the executor or administrator to perform the covenant so far as the personal assets might go, and the rest to be made good out of the real assets descended to the heir. (3 P. Wms. 331, 333.)

The view of the principle upon which parties to suits in equity are made, disclosed in the quotation just made from Chief Baron Gilbert, is illustrated by the rule that when a debt is joint and several, the creditor should bring all his debtors before the court, except where the party omitted is only a security; or where nothing has been paid, and the co-obligor is insolvent; or where the co-obligor is dead, and there are no personal assets; or where a judgment has been obtained against one of the obligors who alone is sued, because the judgment drowns the bond and makes him alone liable. (2 Vent. 348; 2 Vern. 195, anno 1690; 3 Gill & Johns. 491, per Bland, Chancellor.)

So where a bill is filed to affect a fund in which different persons have an interest, they must all be made parties, in order that their respective interests in

the fund may be fully and finally adjudicated; and thereby multiplicity of actions be avoided, and even, perhaps, inconsistent adjudications also avoided, by all persons interested being before the court before any decree is passed. (11 Gill & Johns. 449.)

Besides the principle of interest in the controversy by which the question of parties is determined, the courts, in furtherance of justice, allow, in suits against corporations, their officers or agents to be made parties defendant, though unaffected by the relief prayed, in order that they may make discovery on oath, which a corporaté body cannot do, and without which the object of the bill could not be accomplished. But as they are made parties only for discovery where relief is sought against the corporation, they cannot be made parties where the whole relief claimed is against persons other than the corporation. (9 Paige, 188.)

In treating of cases illustrative of the general principles in relation to parties to suits in equity which have now been disclosed, the most definite mode, and the most instructive to the student and available to the practitioner, will be to classify and consider them with relation to the different capacities in which persons appear in court.

In treating of the different capacities in which persons appear in courts of equity as parties to bills, that of executor and administrator will first be considered.

Suits affecting executors and administrators are of two kinds: those which arise out of the death of the deceased, such as suits by legatees, or next of kin, which could not have been instituted during the life of the deceased; and suits which do not arise out of the death of the deceased, but could have been instituted against him in his lifetime.

In cases where the deceased could have been sued in his lifetime, after his death, his executors or administrators, as persons who possess and are responsible for his personalty and are in that respect his representatives, must be made parties. So in suits by legatees or next of kin, the executors or administrators, being responsible for the correct distribution of the personalty, must be made parties.

No part of the personal estate of a deceased debtor can be applied in payment of his debts without making his executor or administrator a party to the suit. (1 Bland, 443.)

It is a general rule that the executor or administrator, as well as the heirs and devisees, must be made a party to a creditor's bill. (2 Bland, 509.) To a bill filed for the sale of the real estate of a deceased debtor for the payment of his debt, on the ground that the personal estate has been exhausted, the executor or administrator of the deceased must be a party. (4 Harris & Johns. 333.) Because the real estate being answerable only in case of the insufficiency of the personal estate, the insufficiency of the personal estate must be shown before a decree can be obtained. (2 Harris & Johns. 94.) Where a court of equity is satisfied from the facts in the cause that a deceased debtor left no personal estate to be administered, they will not require letters to be taken out, or proceedings against an administrator to be shown; although, under other circumstances, such measures might be deemed necessary to make proper parties to the suit. (5 Gill & Johns. 432.)

Where a creditor is under no obligation to look to the personal estate of his debtor, as where he is seeking by a bill in equity to subject to the payment of his

debt a fund on which he has a specific lien, as on land mortgaged to pay the debt, with which the executor or administrator has nothing to do, he need not be made a party to such proceeding. (2 Gill & Johns. 94.)

Where there are several executors, and all have proved the will, all of them should sue and be sued together. (9 Mod. 89, anno 1724.) The authority of the executor is derived from the will, that of the administrator from the letters of administration; and they have, as personal representatives, the same privileges and liabilities as parties either complainant or defendant. And because of the absolute authority which they have over the assets of the deceased, it is unnecessary for a claimant against them to make either legatees or creditors or debtors parties to his suit. The court makes a complete decree, considering the estate of the deceased as protected by the personal representative. In *Peacock v. Monk* (1 Ves. 131, anno 1748) it was said, "The executor in all cases sustains the person of the testator to defend the estate for him, creditors and legatees." The executor may represent the entire personal estate in the capacity of plaintiff, as well as in that of defendant. He may file a bill to recover property of the deceased in the absence of the legatees. (3 P. Wms. 22, anno 1729.) And one next of kin taking out administration may file a bill for an account, without bringing the other next of kin before the court. (3 Sim. 263, anno 1829.) But if an executor, suing for a debt due to his testator, makes a legatee a party, it is no ground for a demurrer. (6 Sim. 617, anno 1834.)

In cases in which realty, as well as personalty, is affected by the prayer of the bill, the personal representative should, in general, be joined in the suit with the real representative. (3 Atk. 341, anno 1740; 9



Mod. 299, anno 1742.) And the principles which determine in what cases the executor must be joined with the heir, determine the cases in which he must be joined with the devisee. Where the will puts the devisee in the place of the heir, and the circumstances of the case are such that if there had been no will the heir would have been a necessary party with the executor, the devisee must be joined with the executor. (3 Atk. 341, anno 1740; 2 Bligh, 567, anno 1820; 3 Russ. 277, anno 1827.)

It being a rule in equity that where more than one are liable to a demand, you shall not proceed against one alone, but must bring all the persons liable before the court; where there are several codebtors, and one dies, his executor must be joined with all the surviving debtors in a suit to recover the amount of the debt. (3 Atk. 406, anno 1746.)

Heirs will next be considered as parties to suits in equity. It is a fundamental rule that whenever a bill prays for the proof of the will, the heir of the testator must be made a party. (2 Ves. 431, anno 1752; 4 Sim. 292, anno 1831.) Whenever the deceased would have been a party in respect of his real estate, and his interest has survived him, such interest must be represented in the suit by the heir, or in case of a devise being made, by the devisee, or by the devisee and the heir together. Where a second mortgagee brought a bill against the first, to redeem his mortgage, without making the heir of the deceased mortgagor a party, and the bill alleged that he was abroad, in America, it was held by the court that the heir was an indispensable party; for the natural and common decree in such case is that the second mortgagee shall redeem the first mortgage, and that the mortgagor shall redeem him or stand fore-

closed. In such case, the foreclosure would conclude the interests of the heir in a suit to which he was no party. (2 Bro. Ch. R. 276-279; 12 Ves. 58, 59.) If the bill in this case had sought only a redemption of the first mortgage, without any foreclosure, the court might have allowed the second mortgagee to maintain the bill without making the heir a party, if the second mortgagee was willing to take a decree without any account which would bind the heir of the mortgagor. The only effect of the decree then would be to put the second mortgagee in the place of the first; leaving the amount due on the first mortgage open to examination in the same way as if there had been an assignment of the first mortgage to the second mortgagee. (Story Eq. Plead. sec. 84, n. 1.) In a bill brought by the personal representatives of a deceased vendor, for a specific performance of a contract for the sale of real estate, all the heirs of the vendor ought to be parties, either as plaintiffs or as defendants. (2 Wheat. R. 297, 298.) So to a bill brought by a vendor or his personal representatives, for a specific performance of a contract of sale of real estate made by a deceased vendee, the heirs (or devisees, if any) of the vendee, as well as his personal representative, should be made parties. (9 Price R. 130.) To a bill in equity by heirs at law, to set aside a conveyance made by their ancestor, for fraud and imposition, a final decree will not generally be made until all the heirs are before the court. (11 Wheat. R. 104.) So prone are courts to protect the rights of the heir, in any suit affecting his title, that a motion to deliver title deeds to a devisee was refused on account of the absence of the heir. (1 Ves. jr. 29, anno 1789.)

But the strictness of the rule requiring the heir to be made a party is sometimes relaxed to meet the ends

of justice, where it is required by the circumstances of the case. Where the vendor was dead, and his heir beyond sea, and a bill was filed to compel a purchaser to fulfil articles of agreement by completing his purchase, the court said: "In the present case it appears that the defendant, who articted to purchase, knew at that time that the heir was beyond sea, and still accepted the title without insisting that the heir should join, or that the will should be proved against the heir. Also the defendant admits by his answer that the will was duly executed, and by entering upon great part of the estate has himself executed the purchase; for which reason let him pay the rest of the purchase money, with interest, according to the articles, and at the same time let the trustees and mortgagees join in proper conveyances to the defendant, the purchaser." (3 Peere Wms. 192, anno 1733.)

Having considered, as parties to suits in equity, executors and administrators and heirs—who respectively represent the personal and real assets of deceased persons—creditors, who are entitled to be paid before legatees, or devisees, or next of kin can receive any part of the assets, should next be considered as parties to suits in equity. This is both the legal and logical order of the doctrine of parties to suits in equity.

Creditors are all persons to whom either a person or his estate after his death is indebted; and any creditor to whom a separate debt is due, may institute a separate suit for the satisfaction of his demand. But if different persons are entitled to one and the same debt in portions, they must all be parties to the suit. When a debt is assigned, the suit is usually brought by the assignee in the name of the assignor.

The common practice is for one creditor to file a

bill on behalf of himself and all other creditors. In a creditor's bill, the creditors should be called in to participate as coplaintiffs, but when they come in, they are thenceforward considered parties to the suit, and may be regarded as plaintiffs or defendants, as their interests or the nature of the case may require. (2 Bland, 306.)

If a debtor assigns his property for the benefit of his creditors, and only a certain number of them come in under the trust deed, some of those who so come in cannot file a bill for general account of the debtor's estate, and to have the debtor's funds applied in discharge of those creditors' only who come in under the deed, for they cannot deprive the other creditors of the satisfaction of their claims. (1 Dick. 375, anno 1764.)

A creditor by mortgage and collateral bond cannot sue both as mortgagee and as bond creditor. And a bond creditor cannot sue alone; he must sue on behalf of himself and all other bond creditors. (3 Y. & C. Eq. Ex. 597.) See 3 Atk. 571, anno 1747, and 4 Sim. 47, anno 1830, where it was decided that a bond creditor may file his bill against an executor for an account of assets, and for satisfaction of his debt, without bringing other bond creditors, or creditors of any other description, before the court.

To a bill to vacate a deed as fraudulent as against the creditors of the grantor, the grantor is a necessary party, as well on account of the fraud charged, as because of the title remaining in him for the benefit of creditors. (17 Md. R. 525; 1 Wall. 81.)

To a bill for a foreclosure and sale, all incumbrancers or persons having liens, existing at the commencement of the suit, subsequent as well as prior in date to the plaintiff's mortgage, must be made parties. The rights

of such persons not made parties cannot be impaired by the decree. (3 Johns. Ch. R. 459; 3 Md. Ch. Dec. 23.)

The purchaser of land, at a tax sale, who has the officer's certificate of sale, has such an interest in the land as to be a proper party in a proceeding to foreclose an equity of redemption. (4 Greene [Iowa], 135; Blackwell on Tax, tit. 293, and notes.)

Legatees will next be considered as parties to suits in equity. A legatee may sue an executor for discovery of assets, or for his own legacy, without making the residuary legatee, or any other legatee a party. (12 Mod. 522, anno 1700; 1 Ves. 131, anno 1748.) A legatee of the moiety of a fund may file a bill without bringing the legatee of the other moiety before the court. But a legatee who has made an assignment of a legacy before the commencement of the suit, must make the assignee a party. (3 Y. & C. 17, anno 1839; 4 Y. & C. 17, anno 1840; 1 H. of L. 703.) Legatees whose interests are conflicting, must not be coplaintiffs. (3 Y. & C. 333, anno 1838; 8 Sim. 577, anno 1837.)

By analogy to the case of creditors, a legatee is allowed to institute a suit on behalf of himself and of other legatees. This doctrine is laid down, as will be seen, by Mitford in this treatise. (Chap. ii, sec. viii.) And so when residuary legatees are very numerous, some of them are allowed to sue on behalf of themselves and of all the others. (16 Ves. jr. 328, anno 1809.)

Where an executor hands over property to the residuary legatee, without setting apart a sufficient sum to answer a particular legacy, for which a bond is given by the residuary legatee, and the executor states to the

particular legatee that the amount of such legacy is less than it really is, the particular legatee may maintain a suit for the difference against the residuary legatee and the representatives of the executor personally, without making the representatives of the testator parties to the suit. (3 Beav. 544; Talm. 315.)

Legatees are sometimes mentioned in wills by classes. In such case, it is the practice to have an inquiry whether all members of the class are before the court. This is only the application of a general rule, that where classes of persons are interested, an inquiry shall be made by the master, whether all members of the class are before the court. (1 Hare, 327, anno 1842; 4 D. & W. 149, anno 1843; 4 Sim. 573, anno 1831.)

As next in order, devisees will be considered as parties to suits in equity. Where the suit is to establish the will, the devisee and the heir are both made parties; the question in fact being between them. (2 Ves. 431, anno 1752; Ves. 276, anno 1791.) Whenever the circumstances are such that the duty of which the performance is prayed in the bill affects the property devised, and the establishment of a clear title is important, the heir and devisee are necessary parties. (3 Peere Wms. 367, anno 1735; 3 Atk. 341, anno 1740.)

Next of kin will now be considered as parties to suits in equity. Whenever the distribution of the assets to persons beneficially interested is the object of the suit, the presence in court of the next of kin is necessary. (13 Sim. 620, anno 1843.) If there are many next of kin, though all must, when their rights are considered, be before the court, yet all of them need not be parties to the record. (1 S. & S. 330, anno 1823; 4 My. & C. 497, anno 1839.)

The question of parties, in relation to the other important capacities in which persons appear in court, besides those just considered, is sufficiently considered for the purposes of this dissertation, in the occasional instances scattered through the dissertation.

Having considered the doctrine of parties to suits in equity in relation to the different capacities in which they sue, it will make the doctrine of parties more definite, to treat of it in relation to suits for an account; because this kind of relief is so frequently sought that it requires separate consideration.

The prayer for an account is used, not merely in suits which are termed suits for an account, but also in suits for many other kinds of relief; and in all instances where an account is prayed, it is necessary to make every person a party who has an interest which will require protection when the account is taken.

There are few kinds of bills for relief, in which a prayer for an account is not more or less frequently introduced. Thus the prayer for an account is inserted in bills for a specific performance or alteration of agreements, for the establishment of securities, for the payment of sums of money, for dower, for a settlement out of legacies, for the arrangement of partnership dealings, for partition, and in almost all bills filed by mortgagors and mortgagees, executors, creditors, legatees, or debtors. And the kind of relief prayed in the bill, whatever it may be, can make no difference in the matter of making parties in respect of the prayer for an account. They must be made as though an account was the only object of the suit. The rule, for instance, upon which a partner or a mortgagee selects parties to a suit for an account, will not be altered because a dis-

solution of partnership or a foreclosure is prayed at the same time. (Calvert on Parties, 117.)

An account may be sought by several persons against one, or one against several. In such cases, all the persons on each side, having an interest in the account, are necessary parties to the suit. (2 Bro. Ch. R. 338; 1 Keen R. 24.) And where different persons are interested in the account, although not in the same right, they should be joined; as, for example, heirs and personal representatives, residuary legatees and distributees, mortgagors and mortgagees, and their assignees; persons receiving and holding assets in succession, in virtue of their representative character, and persons having distinct interests in the same security, either jointly or in succession. And where different portions of the sum in question have come into the hands of different persons, they should all be made parties for an account. As in a suit by a creditor for an account of the assets of a deceased person, the personal representative of his first representative, in case such first representative received any part of the assets, should be joined as codefendant with the subsequent and continuing personal representative. (1 Mylne & K. 237-248.) If two factors or executors are bound to render an account, they ought both to be brought before the court so as to render an account together. (2 Equi. Ca. Abridg. 167.) All the colessees are necessary parties to a bill for an account of certain allowances to be made by lessors to their lessees. (2 Eq. Ca. Abridg. 166.) A surviving partner of a testator may be joined as a codefendant with an executor to a bill filed for an account by the residuary legatees, and may thereby be required to account to them in respect of the assets in his hands as a partner. (1 Russ. & M. 277; 1 Keen,



534) A bill seeking an account of the assets of an intestate who died in India, which have been possessed by a personal representative constituted by the proper court there, cannot be sustained in the absence of a personal representative of the intestate constituted in England, and consequently no letters of administration have been taken out in this country. (2 My. & C. 89.) And also to a suit instituted for an account of assets of a testator possessed by an executor in Honduras, an executor constituted in this country is a necessary party. (7 Law J. [O. S.] 43, Ch. R. Where a clear ascertained fund is remitted from abroad by an executor to a person in England, to apply it for the benefit of the legatees thereof, the court will determine the respective rights of the several legatees without having a legal personal representative of the testator before the court, if the consignee is a party to the suit; at least, if no objection be made by the defendants on the ground of the personal representative not being a party. (4 Beav. 506.)

The case of *Palk v. Clinton* (12 Ves. 48, anno 1806), presents a remarkable instance of how an interest in the account renders a person a necessary party. Lord Oxford had mortgaged his entire estates in Dorsetshire, Devon and Cornwall, to one Hughes. By his will, his estates in Dorsetshire were devised to one Walpole; those in Cornwall and Devon were devised to trustees in trust to raise certain sums by sale or mortgage. The trustees raised a sum by a mortgage to Palk. The bill in the case was filed by Palk for an account of what was due to the executors of Hughes upon the mortgage to him, and for an account of what was due to Palk under the mortgage to him, and praying that the trustees might be decreed to

sell so much of the estates comprised in that trust, as would be sufficient to pay the sums that might be due upon both those accounts. It must be observed that the object which Palk had in view was only to recover the money which he himself had lent. The question is presented, why should Walpole be made a party to the bill? There is no privity of contract or estate between him and Palk. The reason is, that if the second mortgagee redeem the first mortgagee to any amount, he must redeem him entirely. Thus Palk was obliged to redeem the entire mortgage to Hughes, which was secured on the Dorsetshire estates, as well as upon the Cornwall and Devon estates. Walpole was interested in seeing that the account was properly taken between Palk and Hughes in respect of the liability of the Dorsetshire estates, and therefore he became interested in a suit for the recovery of a loan, which in itself did not affect him, and bound, not his property in Dorsetshire, but the properties of the other persons in Devonshire and Cornwall. (See 15 Vin. Ab. 447, tit. Mortg. F; Calv. Part. p. 126.)

In a bill against a bank for an account of collaterals held by it as security for the debt of a third party, the latter is a necessary party. (3 Sumner R. 423.)

Where the amount of a trust fund for creditors is not fixed, and it is necessary to take an account in order to fix it, all the *cestuis que trust* must be made parties, either as plaintiffs or defendants. (2 Curtis R. 171.)

Where one person has the legal title to a patent, and another the equitable right, both should be joined as plaintiffs in a suit for an injunction and account, founded upon an infringement. (4 Blatch. C. C. R. 333.)

All the partners, or their representatives, are indispensable parties to a bill for a dissolution of the partnership and an account. (2 Abbott C. C. R. 542.)

Upon a bill for an account, filed by one partner against his copartners, after the termination of the partnership, all the parties are regarded as actors, and the accounts must be stated by the auditor, and the concerns of the partnership and rights of the several partners finally adjudicated, as if each partner was a complainant filing a bill against his copartners. (9 Gill & Johns. R. 280.)

In a proper case of an account in equity, it would seem that both parties are regarded as actors, since if it should appear from the auditor's report, in pursuance of a decree to account, that the plaintiff was indebted to the defendant, a final decree might be passed for such balance in favor of the defendant. (2 Gill & Johns. R. 14, per Bland, Chancellor.)

A decree for an account in a suit by one or more creditors against the executors, either for themselves, or on behalf of themselves and all other creditors, is for the benefit of all, and in the nature of a judgment for all, and from the date of such decree an injunction will be granted upon motion of either party, and upon a due disclosure of assets, to stay all proceedings of any creditor at law. (4 Johns. Ch. R. 619; 1 Md. Ch. Dec. 469; 1 Story Eq. sec. 549.)

To a bill by the United States, proceeding as an ordinary creditor, against the debtor of their debtor, for an account, &c., the original debtor ought to be made a party, and the account taken between him and his debtor. (4 Wheat. R. 108.)

Whenever persons sue for an account on behalf of others as well as of themselves, it must appear on the

face of the bill that they sue on behalf of all persons entitled to the account, or make defendants of those on whose behalf they do not sue.

The jurisdiction to superintend a charitable trust is, in England, set forth by the information of the attorney general, suing on behalf of the crown; or, if the trust is such that its non-performance has inflicted personal injury on an individual, then by a compound form of suit, uniting both the public and private wrong, called an information and bill. Jurisdiction in this country is maintained over charitable trusts by courts of equity, by similar procedure modified by our judicial polity.

As the Supreme Court of the United States has original jurisdiction, under the express grant of the Constitution, of controversies between two or more States, the court has established the bill in equity as the proper remedy in disputes between States in regard to their respective boundaries. And it is settled, that where a State is a party, plaintiff or defendant, the governor represents the State, and that the suit may be, in form, a suit by him as governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant. (2 Dall. 419; 5 Pet. 284; 3 Dall. 320; 1 Pet. 110; 4 How. 591; 24 How. 66.)

The equity jurisdiction and jurisprudence of the United States courts are coincident and coextensive with the English, and are not regulated by the municipal jurisprudence of the State where the court sits; and their practice is based on that of the Court of Chancery in England, and not on the peculiar practice of the State courts.

In the foregoing discussion of the doctrines, the

principles and the rules regulating the practice of courts of equity in regard to making parties to suits within their jurisdiction, old authorities have been particularly cited, to show the stability of the rules, proving their wisdom by their long continuance in equity practice. And there is an abstinence from citation of those modern authorities, which are rather illustrative of the idiosyncracies or momentary fancies of individual judges than sound expositions of the ancient and established rules and practice in equity. But it must, nevertheless, be ever remembered, and ever be borne in the professional mind, that courts of equity accommodate their rules of procedure to all exigencies of administrative justice, so as to give effectual relief in every state of circumstances. And as, in the progressive changes in the affairs of men, new cases must continually arise, a court of equity must take cognizance of them, and not, from too strict adherence to rules and forms established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy. It is not at logical consistency that courts of equity aim in devising procedure, but at the attainment of justice in every case of dispute, however peculiar in its exigencies. But nevertheless, in the exercise of its power of accommodating its procedure to the exigencies of justice, within the scope of its special jurisdiction, a court of equity must be guided by some ethical principle consonant with the fundamental doctrines of equity jurisprudence, and which, by its obvious expediency, will recommend itself to ordinary judicial forecast. The selection of proper parties to a suit, notwithstanding simplifications introduced by legislation both in En-

gland and this country, is still sometimes a matter of complicated considerations.

Mitford, in his work, has treated the doctrine of parties to suits in equity with ability, but so briefly that this dissertation is designed to supplement what he has written.

## OF PLEADINGS IN SUITS IN EQUITY.

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BY SAMUEL TYLER.

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THE jurisprudence of the United States is separated into two great departments—law and equity. This peculiar division of administrative justice, has, like our political institutions, come to us from England, as a part of the heritage from our ancestors. The peculiar principles of justice, and the powers of the court of chancery in England, at the time of the American revolution, not altered by our legislation, nor inapplicable to our political institutions, are the same by which the United States courts, when sitting in equity, and the courts of equity in the different States, are governed. In order then, to understand our equity system, we must examine that of England.

The office of chancellor in England, originated in the earliest ages of English institutions. In early times, the chancellor was an ecclesiastic, and was called the keeper of the king's conscience. His duties, from an unimportant beginning, became so extensive that he rose to be the head of the judicial system of the nation, presiding over the administration of justice. No suit could be instituted in any court of law without a writ obtained from him for the purpose. His duties divided themselves into two great occupations: one, the supplying writs to suitors who wished to litigate in the courts of law; the other, the deciding

peculiar classes of cases as a judge. This last branch of his duties is what is meant by his equity jurisdiction; and the principles of his decisions as a judge recognizing equities as distinct from legal rights, and also a peculiar procedure distinct from that of the common law, constitute equity jurisprudence.

The popular meaning of equity is natural justice. But this is not the meaning of equity as understood in the jurisprudence of England and of the United States. A court of equity is not, any more than a court of law, a court merely of natural justice. "The very terms of a court of equity and a court of law, as contrasted to each other, are (says Blackstone) apt to confound and mislead us, as if the one judged without equity and the other was bound by no law." Now, in courts of law, there is not only no divorce of law from natural justice, but no antagonism between them. Law is natural justice modified by circumstances of convenience, of expediency, and of policy. So equity is natural justice modified by the peculiar circumstances and exigencies inherent in the kind of cases belonging to its jurisdiction.

As law does not judge without natural justice, so equity does not judge without law. "Equity follows the law" is a fundamental maxim of equity jurisprudence. A court of equity is as much bound by a statute as a court of law is. It cannot interpret the statute more liberally. The rules of interpretation are the same in both courts. "There is not (says Blackstone) a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity; the construction must in both be the same; or, if they differ, it is only as one court of law may also happen to differ from another.



Each endeavors to fix the true sense of the law in question; neither can enlarge, diminish or alter that sense in a single title." And courts of equity are equally bound by precedents with courts of law. In fact, equity is based upon the same foundations with the common law, and has long been called a part of the common law. "Equity jurisprudence may, therefore (says Story), properly be said to be that portion of remedial justice which is administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law." And equity administration has for centuries been only the complement of the administration of the common law. "Chancery is ordained to supply the law, not to subvert the law," said Lord Bacon, more than two centuries and a half ago. And upon this principle has equity jurisprudence been developed and administered; and such is now its fundamental principle of administrative justice.

What has been called equity in all systems of jurisprudence but the English is little else in spirit, though more in scope, than what is meant in common law courts by equity, in interpreting statutes and other positive rules of law, by enlarging or narrowing the letter in order to give more scope to the spirit of the statute or the rule. The fundamental rule of the kind of equity that is a mere principle of interpretation is *qui hæret in litera, hæret in cortice*. This rule embodies its whole significance. But equity was used in a somewhat larger sense than as a mere rule of interpreting positive rules of law by Aristotle, and afterwards in Roman jurisprudence. In the tenth chapter and fifth book of the Nichomachean Ethics, Aristotle says: "And this is the nature of 'the equitable,' that it is the

correction of law, wherever it is defective, owing to its universality. This is the reason why all things are not according to law, because on some subjects it is impossible to make law. So that there is need of a special decree; for the rule of what is indeterminate is itself indeterminate also, like the leaden rule in Lesbian buildings; for the rule is altered to suit the shape of the stone, and does not remain the same; so decrees differ according to circumstances." In the Roman law the same meaning was attached to equity. In the first book of the Pandects we find: "Neither the laws nor the decrees of the Senate can be so written as to comprehend all cases which may happen; but it is sufficient that they contain those which commonly happen." To supplement the law the prætor's jurisdiction was gradually established. In the first book of the Pandects we find: "That is prætorian law which the prætors have introduced for the sake of aiding, supplying and correcting the civil law on account of public utility."

But, though the prætor's court was, like our court of equity, supplementary in the administration of justice, yet it differed from our court of equity in not being confined in its jurisdiction to separate and peculiar classes of cases. The prætor's jurisdiction became blended with the civil law jurisdiction, and the edicts of the prætor became a part of the civil law, molding its characteristics to its own more comprehensive scope of remedial justice.

To confound equity, in the sense of our jurisprudence, with the prætorian law, and, like the Romans, throw all administrative justice into the same courts with one common procedure, is to destroy the distinctive character of equity as furnishing peculiar relief in

administering justice where the courts of law cannot furnish proper remedies. Equity is applicable to distinct classes of cases, and is administered by a court without a jury, according to a peculiar procedure especially adapted to such cases.

The statute of Westminster the Second, thirteenth year of Edward I, gave to the clerks in chancery the authority to frame new forms of action suited to the circumstances of each case, and hence called equitable actions. But cases frequently occurred in which no original writ could be framed so as to raise an action leading to a judgment which would do complete right, although the defendant had acted "contrary to equity and good conscience." Had it been possible to frame such form of action, the court of equity could never have developed into a separate jurisdiction, especially as the courts of law were so hostile to the jurisdiction.

There are certain transactions which can be judicially investigated, and the justice applicable to them administered better, according to the principles and the mode of procedure of the law; and there are other transactions which can be judicially investigated, and the justice applicable to them administered better according to the principles and modes of equity. And this results from the difference in the nature of the transactions, and the rights and liabilities involved in them. In some cases a general and unqualified judgment is all that justice requires; and such cases are infinite in number, and are the proper objects of law jurisdiction, as they can be better adjusted by the principles of the law and its peculiar mode of procedure than in any other way. Law jurisdiction is confined to cases in which there are but two interests—where all the plaintiffs, whether one or more than one, have

one and the same right, and the defendants are subject to the same liability. The one party seeks to recover from the other a sum of money, or specific goods, or land; and there is a simple judgment that the plaintiff recover, or that he fail.

But there is another class of cases of litigation in which "some modification of the rights of both parties (says Story) may be required, some restraints on one side or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries." In matters of trust, for instance, the court has to ascertain the conduct and acts, as well of all persons in a fiduciary position, as of all their *cestuis que trust*, and to adjust the several claims and liabilities, making all just allowances under the special circumstances of every transaction. So, likewise, in the exercise of jurisdiction for the protection and administration of estates, where there are various classes of parties having different and antagonistic interests, creditors are to be ascertained, assets to be got in, orders are to be made, and directions to be given, from time to time, in regard to the property and its distribution amongst the parties entitled. It is sufficiently manifest that such cases as these cannot be resolved into simple issues, like the class of cases where there are only two interests, and a simple judgment that the plaintiff recover or fail does complete justice. An entirely different mode of procedure is necessary for these cases. The judgment or decree has to be directory, and sometimes reciprocal. The equity mode of procedure has been provided for this class of cases in administrative justice.

In order to get a clear and definite insight into equity procedure, it becomes necessary to advert to its origin in England. The matters litigated in courts of law can all be resolved into simple causes of action that can be classified, and each class be stated in a simple formula called a *form of action*. The system of common law procedure, therefore, begins with a simple formula presenting a single claim of one party against another. When, therefore, such matters arose as those which have just been stated as belonging to equity jurisdiction, the common law furnished no adequate remedy. The person grieved being thus without remedy at the common law, made his complaint, which could not be stated in any *form of action*, to the lord chancellor, whose office was the fountain of justice, and he, thereupon, without common law process, or regard to common law rules of proceeding, as they were not applicable, compelled the opposite party or parties to appear and be examined, either personally or upon written interrogatories touching the matter complained of; and evidence being heard on both sides, the chancellor, without the interposition of a jury, decided *according to equity and good conscience*; because the matters of equity cognizance being of a nature more indeterminate, more modified by circumstances than those of law, admitted of, indeed called for, a larger judicial discretion, a more ample application of the principles of natural justice, in deciding them.

According to the practice which this statement indicates, a suit in equity proceeds in the following manner:

The party seeking relief, called the complainant, or plaintiff, files in the court a petition setting forth the facts of his case and asking for relief.

This petition is called a bill in equity. It is also called an original bill, to distinguish it from other bills which will be presently mentioned, that are filed in the progress of a suit to remedy defects and errors in the original bill.

An original bill consists of five principal parts: 1. The statement; 2. The charges; 3. The interrogatories; 4. The prayer of relief; 5. The prayer of process. These five technical divisions of a bill have their respective functions in the presentation of the complainant's case.

The bill must state the case in direct terms, and with reasonable certainty. The allegations must be positive, and not by way of recital; and must be of facts only, and not of law. And every averment of fact necessary to entitle the complainant to the relief sought must be contained in the stating part of the bill. If every necessary fact for the maintenance of the suit be not distinctly and expressly averred in that part of the bill, the defect cannot be supplied by averments in the other parts of the bill. Nor can the interrogating part of the bill supply the defects of the stating part; for the interrogatories themselves must be confined to the facts alleged in the stating and charging parts of the bill, and can bring in no new fact. The stating part of the bill must state a case upon which, if admitted by the answer, a decree in favor of the complainant can be made.

The charging part of the bill is not essential to its completeness. It is, in fact, only a portion of the stating part. It is a statement of *charges* and *pretenses*. Charges consist of allegations which the complainant does not know to be true, or is not able to prove; but which he suspects to be true, and as to

which he wishes to have the answer of the defendant. Charges are also sometimes used in stating, as a conclusion of law, the relief to which the complainant thinks himself entitled. Pretenses are used when some defense is anticipated as likely to be set up, and the complainant alludes to it, charging that it is a mere pretense, and stating matter to avoid it. By such means the complainant compels the defendant to answer the charges, and to disclose the truth as to the pretended defense.

After the statement and the charges, the bill next requires the defendant to make discovery, that is, to give answer on oath, in respect of the several matters specifically stated and charged; and, in the case of executors, trustees, and others administering property fiducially, to set forth accounts of the property under their administration, and to give a list of books, accounts, and documents relating to the matter of inquiry. With a view to this discovery of facts, the bill contains an interrogating part. In this part the statement and charges and pretenses are converted into a series of interrogatories, framed on the principle that without the interrogatories, which must be answered specifically, the defendant would answer evasively. By the 43d rule of practice for the courts of equity of the United States, to be found in the appendix of this volume, the interrogatories are placed at the end or foot of the bill.

After the interrogating part, the bill prays for the relief to which the plaintiff thinks that the case stated in the bill entitles him, and concludes with a prayer for general relief, under which any relief may be given to which a title is made out at the hearing. It is always best not to trust to the prayer for general

relief, but the specific relief sought should be expressly prayed; and this may be done in the alternative, so that if the court should not think that the case made out justifies the relief first asked for, yet the plaintiff may have some other to which he is entitled. And, in conclusion, the bill prays process of subpoena against the defendants to compel them to appear and put in an answer in writing.

The bill is signed by the plaintiff or his counsel, or by both, and is filed with the register of the court of equity.

The frame of a bill, with its several technical parts, has thus been described. But the well established principles of equity pleading require nothing more than a simple statement of the complainant's case, with a prayer for relief and for process of subpoena. In theory the bill is as simple as it can be; and the practice should conform to the theory, never using any of the adventitious parts of the bill, except where the particular case may require it, to unveil the transaction fully to view.

In accordance with the prayer of the bill, the clerk of the court of equity issues a writ, under the seal of the court, called a subpoena, by which the defendant is required to appear and answer the bill.

If the defendant appears according to the requirement of the subpoena, he then makes his defense according to the forms established in equity pleading. And the exigencies of justice, as administered by a court of equity, require several forms of defense for the protection of defendants. These forms of defense will next be considered.

If it shall appear, from the complainant's own statement of his case in the bill, that there is nothing



to warrant the interference of a court of equity, the proper course for the defendant is to demur to the bill for insufficiency, and demand the judgment of the court whether the suit shall proceed at all, or the defendant make answer thereto. This mode of defense is called a demurrer.

If the bill be sufficient in its statements and charges to warrant the interference of equity, but the defendant knows matters, not appearing on the face of the bill, which afford a reason why the suit should be either dismissed, barred, or delayed, it is the proper course for the defendant to meet the bill by a statement of these matters. Or if some particular matter stated in the bill, which is essential to the plaintiff's case, be false, this matter should be met by a denial. In such case the judgment of the court is demanded whether the defendant shall be compelled to answer further. This mode of defense is called a plea.

If the defendant has no claim, or disowns any, to the subject of the demand made in the bill, his proper course is, to disclaim all right and title to the matter in demand, and pray judgment of the court, that he be dismissed with allowance of his costs. This mode of defense is called a disclaimer.

Where neither a demurrer, nor a plea, nor a disclaimer is pleaded to a bill, the suit proceeds, in its more common course, by the defendant's answering the allegations and the charges in the bill, and demanding the judgment of the court on the whole case made on both sides. The defendant must answer distinctly, fully and completely, without needless prolixity, positively and directly, and not by way of argument, to the best of his knowledge, information and belief, every statement, charge, pretense and interroga-

tory in the bill, by either admitting, traversing, confessing and avoiding, or ignoring, all the facts stated and charged. And the defendant must answer, not according to the information which he actually possesses at the time the bill is filed, but according to all the information which he has, and can procure from his books, his agents and all the means under his control. This mode of defense is called an answer. If an answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. (1 Gill & Johns. 503.)

After the answer is filed, the plaintiff may, if he is satisfied with the defendant's answer, have the cause heard on the bill and answer; in which case, he admits the answer to be true in all respects. Or he may file a replication, which is a general denial of the facts stated in the answer, requiring the facts to be proved. Or he may except to the answer, for want of fullness, in order to compel further answer. If further answer be put in, the amended answer is as though it had been put in at first, and liable to be so treated by the plaintiff.

After the replication, the pleadings are ended, and the case is said to be at issue.

At first view, the three modes of defense, by demurrer, plea and answer, may seem needlessly to divide the ground of defense in equity causes. That the disclaimer is necessary is too obvious to need proof. And as the other three forms of defense adduce matters which are different in the nature of things, and have different effects in reason and justice, they are necessary in order to avoid confusion and insure definiteness in practice. There are certain rights of defendants in equity, which cannot be ade-

quately protected, except by demurrers and pleas. The great aim in equity procedure is to procure from the defendant, as a sworn witness in the case, an admission of the case made by the bill, either in aid of proof or to supply the want of it, and to avoid expense. To this end, an answer from the defendant is the great object to be obtained by a suit in equity, as a means towards a decree for relief. Equity pleadings, therefore, center around the answer. The answer is what the plaintiff especially seeks, and what the defendant especially avoids. The demurrer and the plea are the modes of defense used by the defendant, against being compelled to answer. The demurrer shows, from the face of the bill, that the plaintiff is not entitled to an answer or discovery of the matters sought by him. And the plea shows the same thing, either by stating new matter not contained in the bill, or by denying some essential facts. If the demurrer or plea be allowed by the court, the defendant escapes an answer, which it is his great purpose to accomplish. For example, if a plaintiff sets out his right to an estate, and prays a discovery of some particular facts respecting the title, and the defendant, by plea, avers that he is a *bona fide* purchaser for a valuable consideration without notice, he will be protected by such plea from the required discovery. So where a person avers his right to a share in a certain trade as a partner, and as such calls for a discovery and account; and the defendant denies, by plea, the fact of the partnership, he will be protected by such denial from the discovery and account. In both of these cases, it would be prejudicial to the defendant to make the discovery sought by the bill, either of the particulars showing defects in his title, or of the account of the condition of his busi-

ness which the plaintiff avers is in partnership with himself. Therefore the defendant pleads, so as to show that the plaintiff has no right to the discovery, and thereby breaks up the whole case without injury to himself. This function of defense by plea, places under strict regulation the jurisdiction exercised by courts of equity in compelling discovery. But the function of the demurrer and of the plea is not only to prevent a discovery which may be prejudicial to the defendant, where the plaintiff has no right to discovery, but also to interrupt, at an early stage, any cause which must ultimately end in nothing, and thereby save the expense and vexation, and delay which would result from putting in a full answer, and which, in most cases, would be followed by taking testimony and a final hearing on the case as disclosed by both parties.

Such is an outline of equity pleading, and of the respective functions of the several forms of pleadings. A rigid technical construction of equity pleadings is not required. But every material allegation must be put in issue by the pleadings, so that the parties may be apprised of the essential inquiry, and be enabled to collect testimony to meet the issues of fact.

The modern policy of equity pleadings is to bring out the whole case in the bill and answer, and not to let the case run out into lengthened pleadings as at common law, which was the earlier practice in chancery. According, therefore, to the present practice, the pleadings close with the replication, when it is a general one, as it almost always is. In ancient practice, a special replication was used to meet any new matter which the defendant might introduce into his plea or answer. The consequence of this special repli-

cation was a rejoinder by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication. And if the rejoinder disclosed any new matter which required an answer, the plaintiff put in a surrejoinder, to which the defendant, in his turn, put in a rebutter. The some real, and the many imaginary evils of these proceedings occasioned an alteration in the practice. In the place of special replications, amendments of the bill have been substituted, by which the new matter, formerly presented in a special replication and in a surrejoinder, is inserted in the bill, and the defendant can then put in a further answer. So that the bill contains, by this mode of amendment, the whole case of the complainant, and the answer contains the whole defense of the defendant.

In courts of equity, misleading in matter of form is never allowed to prejudice any party. And mistakes may be corrected, impolitic admissions suppressed, additional facts added, and all other things done which are needful to insure a hearing on the substantial merits of the case set forth in the bill and answer.

Thus far equity pleading has been treated as if there were but one kind of bill. Only original bills praying for relief, and the defenses applicable to such bills, have been considered, because they are the most usual in courts of equity, and the principles of pleading which govern them regulate all other bills and defenses, subject to some exceptions and modifications. If, in the outset, the different kinds of bills had been enumerated, it would have produced perplexity and confusion, by dividing attention between a multiplicity of objects, differing only in peculiarities which it is needless to notice in a general survey of the system of equity

pleading. But this survey would be very imperfect if it did not, at some stage, remark upon the different kinds of bills which the exigencies of litigation in courts of equity render needful, and point out their relation to the general scheme of equity pleading. The different kinds of bills and their functions in equity procedure will, therefore, be now considered.

There are in the scheme of pleading which the courts of equity have devised for the conduct of litigation two great classes of bills—those which are original, and those which are not original. Original bills are those which relate to some matters not before litigated in the court by the same persons standing in the same interests. Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are either an addition to or a continuance of an original bill, or both.

These two great classes of bills, original and not original, may each be divided into other classes.

Original bills are divided into those which pray for relief and those which do not pray for relief. All bills may, in a certain sense, be said to pray for relief. But, in the sense of courts of equity, such bills only are deemed bills for relief which seek from the court in that very suit a decision upon the whole merits of the case set forth in the bill, and a decree which shall ascertain and protect present rights or redress present wrongs. All other bills, which merely ask the aid of the court against possible future injury, or to support or defend a suit in a court of law, are deemed bills not original.

Original bills praying for relief may themselves be divided into two kinds. 1. Bills praying the decree of the court in regard to some right claimed by the defend-

ant, or in regard to some wrong done in violation of the complainant's right. 2. Bills of interpleader, where the person filing the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons for the safety of the person exhibiting the bill, thereby compelling those persons to litigate the matter between them, that there may be a decree.

Original bills not praying for relief are of two kinds.

1. Bills for discovery of facts resting in the knowledge of the party to a suit at law against whom it is exhibited, or of deeds, writings, or other things in his custody or power. 2. Bills to examine witnesses *de bene esse*, and bills to perpetuate testimony.

Bills not original are divided into two classes. 1. Bills for an addition to or continuance of an original bill. 2. Bills for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the court, or carrying it into execution.

It is at once apparent that all these different bills are determined in their respective characters by the different purposes for which they are exhibited, and consequently have a substantial, and not a mere technical, difference. They all subserve the purposes of justice as administered in courts of equity. All these different kinds of bills are fully explained by Mitford, and forms of them are among my additions to this volume, in the fourth part of the chapter on practice.

Having now presented an outline of the scheme of equity pleading, it will be profitable to explain the important difficulties which have occurred in applying its rules in cases of equity administration.

The modern practice of making all defenses by

answer has led to great confusion; and questions in pleading have arisen so paradoxical that judges, perplexed and bewildered, have hardly known how to decide them. These perplexities culminated in the case of *Bayley v. Adams* (6 Ves. jr. 586), which came before Lord Chancellor Eldon, in the year 1802. It is a rule in equity pleading that if any matters be inquired after by the interrogatories in the bill which, if true, as alleged in the bill, would invalidate the plea, the plea must be accompanied by an answer to these interrogatories denying the correctness of the statement of the bill on these points. Such form of defense is called a plea supported by an answer. In the case of *Bayley v. Adams* the statute of limitations supported by an answer was pleaded. The plea of the statute of limitations contained no denial of the facts of the bill necessary to be denied in order to make it a good defense, but the answer in support of the plea did contain such denial. And the question arose whether the charges in the bill ought to have been met by way of averment in the plea, as well as by averment in the answer. It was maintained by the plaintiff that the plea must constitute a complete bar to the suit, and must therefore by averment answer the charges in the bill which, if true, would avoid the plea. Because, if the plaintiff takes issue upon the plea, and it does not contain a complete answer to the bill, the plea may be proved, and yet the case stated by the bill may entitle the plaintiff to succeed. It was admitted by the defendant that the answer in support of the plea must deny the facts in the bill which would avoid the plea, but that it was not necessary to make the denial by the plea and the answer both, such repetition being superfluous.

Lord Eldon was at a loss how to dispose of the



question presented upon the sufficiency of the defendant's pleading. "The first difficulty upon that (said he) is how to consider that record filed by the defendant, consisting partly of what is called a plea, partly of what is called an answer, as in a correct sense either a plea or an answer. The office of a plea in bar at law is to confess the right to sue, avoiding that by matter *dehors*, and giving the plaintiff an acknowledgment of his right independent of the matter alleged by the plea. The plea alleges some short point upon which, if the issue is joined, there is an end of the dispute. In this court, in general cases, not classed among those where certain averments seem to have been required both by the plea and the answer, but where the defendant *pro hac vice*, for the sake of the argument, admits the whole bill, I have understood the rule to be the same here as at law, that the plea admitting the bill interposes matter which, if true, destroys it, and upon the truth of which the plaintiff is at liberty to take issue. Cases have arisen in which it has been thought necessary both to plead and to repeat the assertions of the plea in an answer—that is, as technically expressed, the plea is supported by an answer."

Lord Eldon, in his perplexity, declaring that the pleading filed by the defendant was in a correct sense neither a plea nor an answer, ordered the pleading to stand for an answer, with liberty to except.

Though Lord Eldon in that case evaded the decision of the question whether the plea as well as the answer should contain averments negating the circumstances averred in the bill in avoidance of the defense, it is now the established doctrine that both the plea and the answer in support of it, when such form of defense is made, must contain such negative aver-

ments, as will appear, at the proper place, in Mitford.

In order to free equity pleading from the confusion caused by mixed defenses, partly plea and partly answer, to use the expression of Lord Eldon, it is necessary to advert to a peculiar element in equity pleading which is wholly alien from the nature of pleading, bearing no logical relation of either denial or of confession and avoidance, as all defenses must, to the cause of suit, but only the probative relation of proof, being not defense, but evidence. The theory of equity procedure—and it is a distinguishing basis of equity relief—is, that the defendant is a witness in the suit, as well as a party, made such by the plaintiff, to get proof which cannot be got otherwise, or at least so conveniently or so cheaply. And the answer of the defendant, so far as it is responsive to the bill—for to that extent he is made a witness by the plaintiff—is evidence in the cause either for the defendant himself or the plaintiff, as it may turn out. It is this element of proof which has introduced perplexities, anomalies, and contradictions into the scheme of equity pleading, embarrassing the administration of equity. If Lord Eldon had discriminated in the pleadings in the case of *Adams v. Bayley* the two elements of defense and of discovery, the first contained in the plea and the other in the answer, he would at once have seen that the plea, in order to be complete as a plea in bar, must contain all the negative averments necessary to meet the matters of avoidance charged in the bill in anticipation of the defense, and that the answer was only evidence in support of the defense, and not a part of it; and being no part of the plea, the defect in the plea was not cured by the answer, and consequently the pleadings did not

put in issue the matter of avoidance charged in the bill.

By the common law pleading, which forms successive issues and never simultaneous ones, the plaintiff's case is first in his declaration, then in his replication, then in his surrejoinder, and next in his surrebutter, provided a demurrer, which raises only a question of law, be not pleaded, at any step, by either party. And only the question involved in one issue, from the plea to the surrebutter, whichever issue the pleadings may stop at, is the case to be tried, and evidence only to that issue can be adduced. But as by modern equity pleading all that, at common law, can be stated in the different successive pleadings by the plaintiff can be put into the bill, and all the defendant's defenses can be put into the answer, simultaneous issues may be formed, to all of which evidence can be adduced; and as discovery from the defendant is a species of evidence which the plaintiff can require, the question of the extent of the discovery, whether to the whole case presented by the bill and answer, or only to any single point raised by a plea, which must be first disposed of, while all points in the cause which are subordinate and dependent upon it are suspended until it is tried and decided is the important inquiry. In other words, whether, if a defendant submits to answer, he must answer fully.

The right of discovery does not attach to an issue raised by demurrer, because the facts as stated in the bill are admitted by the demurrer, and only a question of law is raised by it. But the right of discovery attaches generally to every issue of fact, whether raised by plea or answer, and is commensurate with the question involved in the issue. And if the defendant, after

replication by the plaintiff to his plea, fails to prove the truth of the plea, he will be compelled to give the discovery required by the bill, not by way of formal answer including his own case, but by way of mere answers to interrogatories put for the purpose of eliciting it.

If the plea be one where the defendant cannot be required to make discovery of the substantial facts involved in the plea, such as a purchase for valuable consideration without notice, he may nevertheless be required to make discovery of facts which tend to prove constructive notice, if such facts are charged in the bill, and cannot claim the right to make no discovery at all by which his title may be affected. So that the question, as to what facts pertaining to an issue the defendant must make discovery, often involves very subtle distinctions.

Where a defendant defends by answer, whether from necessity or choice, he thereby submits that all parts of the case, principal and subordinate, shall go to trial simultaneously, and must therefore make full discovery in regard to every point. If, for example, a bill prays for an account, and the defendant, by plea, insists upon a release of that account, the fact of the release will go to trial in the first instance upon evidence and discovery confined to it, and the question of account will be suspended, and the right to discovery in regard to the account also. But if in the same case the defendant submit to answer the bill, and by his answer pray the same benefit of the release as if he had pleaded it in bar, he will be entitled to that benefit at the hearing of the cause; but he cannot, in the interim, refuse such discovery as may be relevant and material to the question of account alone, and which, if the release be supported, will in

result prove useless. For as by defending by answer all points, the subordinate one of account is to come on simultaneously with the one of release for trial, the right of discovery as to the account attaches, because the plaintiff must come fully prepared for such trial by all the evidence within his power. The plaintiff's case, when it is defended by answer, embraces every point which he makes by his bill, whether for the purpose of establishing his case, or of controverting the truth or validity of the defense. In an answer, which embraces all the defenses which might have been made by plea, the exigencies of equity administration may require that the trial of one point, or more than one, in a cause be suspended until some particular point shall have first been decided, because such decision may exclude the other points from adjudication. And the order in which the points should be decided, so as to protect the defendant from claims founded on untenable averments in the bill, is often so uncertain upon the pleadings, as to expose the court to the necessity of ordering amendments on both sides; and both solicitors and judges all the while seem to be pursuing a tentative course of procedure, rather than following fixed rules, as justice, which must always decide upon the same rules, requires.

The difficulty of correlating and adjusting the element of discovery with the element of defense, in the scheme of equity pleading, has led to great confusion in practice. It was the want, as has been already shown, of distinguishing the two elements in the pleading on the part of the defendant, in the case of *Bayley v. Adams*, which produced the question, whether the pleading, which Lord Eldon said was partly plea and partly answer, should make the same

avermment of denial twice, as must be done where the defense is by plea supported by answer. In the latter case, the plea, in order to be a good plea to the bill, must be a perfect defense to the point in the bill to which it is pleaded; and the answer, as discovery, must support the plea, repeating the essential averments in the plea, as the plea is never evidence, as is discovery when in an answer it is responsive to the bill. A plea supported by answer is in fact a special answer; and where upon argument the matter offered by way of plea is not properly supported by the answer, so that the truth is doubtful, the court in such case, will, instead of overruling the plea, order it to stand for an answer, and will pass the same order where the plea may be a defense, but has been informally pleaded, as in the case of *Bayley v. Adams*. And this may be done either with or without liberty to the plaintiff to except, according to the more or less imperfection of the pleading as an answer. And if a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless, by the order, liberty is given to the plaintiff to except. This liberty is sometimes qualified so as to protect the defendant from any particular discovery which he ought not to be called upon to make.

In discriminating the element of defense from the element of discovery or evidence, it is well to bear in mind that, in a court of equity, as well as in a court of law, causes of suit and defenses must have the like logical and legal relations to each other; because, in both courts, the relations between causes of suit and defenses must be governed by the laws which determine rational thought. And, in both courts, the legal

relation of defenses to causes of suit, must be determined by the logical relation of either denial or confession and avoidance; because every possible defense must either be denial or confession and avoidance; whereas discovery or evidence has not a logical relation at all, but only a probative relation both to causes of suit and to defenses, either proving or disproving them. As the right of discovery does not attach to a question of law, defense by demurrer does not come into the consideration of the distinction between the element of defense and the element of discovery in equity pleading.

By a rule of common law pleading, it is not necessary, for any end to be gained in a suit, to state matter of evidence, or matter which should come from the other side. This rule is excluded from equity pleading by the right of discovery. It is sometimes important to a plaintiff in equity to anticipate in his bill the defense or supposed defense, sometimes admitting its truth, sometimes only suggesting it as matter relied upon by the defendant, without admitting its truth, and alleging matters which, if true, will avoid the legal consequences, or disprove the truth of the defense so anticipated. As, for example, the bill anticipates a deed as the defense, and charges that it was obtained by fraud. In such case, the charge of fraud in the bill would be in the nature of a replication to the anticipated defense, and the onus of proving the alleged fraud would be upon the plaintiff. Therefore he would be entitled to discovery in regard to the imputed fraud. And if the bill charged special matters as evidence of fraud, the plaintiff would be entitled to discovery in regard to the special matters also; because the court must be informed of the

special matters, in order to determine whether they show fraud. But the plaintiff cannot, by anticipating the defense, prevent the defendant from still pleading it. As, however, the plaintiff, in his bill, has charged fraud or other matter of avoidance to invalidate the defense, and has demanded discovery of the defendant in regard to the charge, the defendant cannot plead the mere matter in bar, as he would have done if the defense had not been anticipated. He must meet the charges in the bill. The form, therefore, of pleading to such bill is to plead the defense—the deed—with averments negating the allegations of fraud in the bill by which the defense is sought to be avoided. The plea is the formal defense which raises the issue upon the bill, and must therefore be a complete bar, containing all necessary averments negating the charge of fraud. But it only raises an issue. It is not, like an answer responsive to a bill, evidence. It must therefore be supported by an answer responsive to the bill. And as evidence supporting the plea, the answer must repeat the negative allegations contained in the plea. By such pleading the requirements of the bill are fully met. Such plea is called an anomalous plea.

Whether the plaintiff anticipates originally, in his bill, the defense, or introduces it by amendment after plea pleaded, the effect is the same. And the discovery, so far as respects fraud or other matter avoiding the defense, would be the same, whether the defense were made by plea or answer.

Discovery does not attach to a pure plea, one that states new matter not in the bill as a reason why the suit should be dismissed, delayed, or barred; because, as discovery is confined to the statements in the



bill, discovery cannot be asked touching the matter of a plea which is not in the bill. And there is nothing to ask discovery about, as the plea admits the truth of the facts set forth in the bill. And if, after argument, issue be joined upon the truth of the plea, and the plea be found untrue, as the plea admits the truth of the plaintiff's case, there is an end of the dispute, and the plaintiff is entitled to a decree. No discovery therefore is required. But if, in such case, the plaintiff could not obtain complete relief as to other points in the case without further evidence, the court will supply the defect by allowing him to examine the defendant upon interrogatories as to those points, which, in consequence of the plea being overruled, became the plaintiff's case. The plea, so far as the admission it afforded, is not complete, and is only suspended for the purpose of trying the plea in the first instance, and does not take away the right of the plaintiff to that discovery which he will require in case the plea shall prove invalid or untrue. (See Wigram on Discovery, *passim*.)

Though at an early stage in the development of the equity jurisdiction of the Court of Chancery in England the pleadings in equity conformed very nearly to those at common law, yet until a late period a purely negative plea, which is so prominent in the scheme of common law pleading, was not allowed in equity. It was, for example, a question which underwent much vexatious discussion, whether a defendant could allege, in opposition to the claims of the plaintiff, as heir at law, that the plaintiff was not heir at law. But it is now settled that not only is such a negative plea, which merely goes to the person of the plaintiff, but that a negative plea which goes to the foundation

of the suit and the right of the plaintiff, is good. As, for example, where a bill charges that the defendant is a partner, and seeks an account of the partnership transactions, a plea that the defendant is not a partner is now recognized as a good plea. As the defendant is not bound, upon any equity, to account, unless he is a partner, if he could not make defense upon the single point that he is not a partner, he would be compelled to account, though the plaintiff has no right to discovery. The character of a pleading must be determined by the function it performs in the administration of equity. If, therefore, it be the true rule, as will be presently shown, that when a defendant defends by answer he must make full discovery to all the requirements of the bill, it is a corollary of this that any defense against this right of full discovery must be considered a plea.

In the whole series of reported cases in equity, from the earliest period, the embarrassment of the judges in regard to the pleadings is manifested by remarks in their respective opinions. As late as 1838, Lord Chancellor Cottenham, in *Foley v. Hill* (3 My. & Cr. 482), said: "The whole machinery of pleading in equity is somewhat cumbrous and not quite well reduced to principle." It is more correct to say that the machinery of pleading has been made cumbrous by deviations in the practice of the courts from the true principles of the system. The want of wise judicial forecast, which induced courts of law to introduce general issue pleas, to the exclusion of special pleas, into common law pleading, influenced courts of equity to substitute an answer, making all defenses simultaneously, in the place of successive alternate pleadings on the part of plaintiff and defendant respectively. A plaintiff was allowed to

introduce into his bill what would, according to principle, come in a replication. Hence pleas with answers to support them, called anomalous pleas, became necessary defenses to such anomalous bills. And the fact that purely negative pleas were disallowed, by which a single point might be made upon matter on the face of the bill, contributed to the other destructive influences of true analytical pleading, and centered all defenses in the answer. Now the courts became embarrassed as to the form of statement of the different defenses, as in the case of *Bayley v. Adams*, and became equally as much embarrassed as to the question of discovery, and also as to the order in which the different points raised by the different defenses must be brought before the court, and sometimes whether and when all the points must be considered together. Within the past year, the Supreme Court of Rhode Island, in the case of *Green v. Harris et al.* (9 Rhode Island, 401-9), was much perplexed in regard to the question whether a plea in bar, which was a part of an answer, must contain all the necessary averments to meet the charges of fraud and error which were made in the bill, in anticipation of the plea, so as to meet it, as it must do if pleaded separately as a plea and not as a part of an answer. The court decided that the plea, being part of an answer which contained averments denying the fraud and error, must be construed in connection with such averments. As the answer was a defense, and not mere discovery, like an answer in support of a plea, the negative averments were properly construed by the court in connection with the plea, making it complete as a defense when a part of an answer.

But the most important difficulty with the courts has been in determining whether, if a defendant defends

by answer, he must make full discovery, though the answer contain matter which, if pleaded separately as a plea, would have avoided discovery—as, for example, the denial of partnership. Though the general current of decisions had been, and continues to be, otherwise, yet, in the case of *Ovey v. Leighton* (2 Sim. & Stu. 234, anno 1825), Vice Chancellor Sir John Leach decided that a purchaser for valuable consideration without notice, submitting to answer, and not protecting himself by plea, must answer fully. And in the case of *Earl Portarlington v. Soulby* (7 Sim. 28, anno 1834), Vice Chancellor Sir L. Shadwell decided that the rule laid down in *Ovey v. Leighton* was correct.

These decisions extend the rule that the defendant who defends by answer must answer fully to every possible case; because the case of a purchaser for valuable consideration had been the one that was especially excepted by the courts from the rule. For even Lord Thurlow and Lord Eldon recognized the rule as extending to all cases, except that of a purchaser for valuable consideration, and the case where, by a full answer, the defendant would criminate himself. But it was the opinion of Lord Eldon, that it is better that such defenses be made by plea. In the case of *Rowe v. Teed* (15 Vesey, jr. 372), anno 1808, he said, speaking generally: “It will be infinitely better to decide that in this court the objection should be made by plea rather than by answer.” This is manifestly the rule which logical consistency requires, because an answer *prima facie* admits that the defendant cannot plead; therefore, to avoid this admission, it is best to defend by plea; and it is also a more economical rule, because there is much less expense in bringing forward the objection by plea than by answer.

In the whole series of judgments by courts in equity causes, both in England and this country, there is not one which has discussed with such comprehensive and precise discrimination the whole scheme of equity pleading, ascertaining the special function of each pleading, and exhibiting the fundamental principles, and the practical rules which constitute it a coherent system of interdependent functions, for bringing before courts the various points in equity causes, in the order in which the respective equities of the complainant and defendant require them to be decided, as the judgment of Chancellor Bland, of Maryland, anno 1828, in the case of *Salmon v. Claggett*. (3 Bland Ch. R. 125.) In this case, the defense was by answer, which contained several matters of defense that, if urged by way of plea, would have exonerated the defendant from making as full discovery as the requirements of the bill demanded; and it was maintained by the defendant that such matter in avoidance, contained in the answer, would subserve the purposes of a plea. After the most searching examination of the reasons upon which the modern cases are founded, that allow an answer in avoidance to subserve the purposes of a plea, the chancellor overruled the decisions, as inconsistent with the fundamental principles of equity pleading, and decided that the ancient rule, that a defendant who submits to answer must answer as fully as the bill requires, should stand for the government of the proceedings of the Chancery Court of Maryland, without any exception whatever.

The question arose upon exceptions to the answer, and a motion to dissolve an injunction in the case, which, according to the practice of the court, were taken up and considered at the same time. The

chancellor said, that though the allegations of avoidance would, at the hearing, if sustained by proof, constitute a complete defense against the claims of the plaintiff, yet, at that stage of the controversy, other considerations presented themselves.

These considerations were questions of pleading; the chief of which was, whether the answer was a sufficient defense without making any further disclosures. The object in calling for an answer is to serve the purposes of the plaintiff, not of the defendant. The answer called for by the bill is as to certain facts therein stated, and the defendant is required to say whether they are true or false, and to set forth all he knows about them. Such an answer, responsive to the bill, is equivalent to parol evidence as to all matters where such testimony is available. Often it is the only evidence which the plaintiff can procure to sustain his bill, and its importance is none the less because, by calling the defendant as a witness, the plaintiff makes his answer, so far as it is responsive to the bill, evidence against himself, if it should be adverse, which cannot be overturned by one witness alone. Such is the nature of the answer called for by the bill. It is evidence. The defendant is, by equity practice, bound to make such answer to the full requirements of the bill. There are certain equities, however, that excuse him from making such answer. According to the ancient rule of pleading, such defense against answering should be made by a plea; and Chancellor Bland decided that such defense can be made available only by plea.

But besides an answer merely responsive to the bill, there may be one containing matter of avoidance;

but, as this matter is not called for by the bill, it is not evidence as that is which is called for; and if the plaintiff puts in a general replication, the defendant must prove them at the hearing, or they will be disregarded. But if the plaintiff does not reply, or if he sets the case down to be heard upon bill and answer, then such allegations must be received as true; not because they constitute any part of the answer called for by the bill, but because the plaintiff, by setting the case down on bill and answer, or refusing to reply, has precluded the defendant from proving them; and, therefore, by that act, he makes a tacit admission of their truth, and they are accordingly received as admissions.

We will have a very inadequate appreciation of equity pleading, as a means of presenting and raising for consideration and judicial adjustment, the several points in complex equity causes, if we consider only the separate functions of the different pleadings; for, besides the different grounds of defense which a defendant may set forth, and rely upon by demurrer, by plea, by answer responsive to the bill, or an answer in negation or avoidance of it, there may be found, at the hearing, a substantial defense arising out of the whole case, which has not, in any way, been specially advanced and relied upon by the defendant in his pleadings. A defendant may, for example, in his answer, rely upon lapse of time, as a defense against a stale claim; but, if he should have been entirely silent in his pleadings, as to lapse of time, he may have the benefit of the presumption of satisfaction arising from lapse of time at the hearing. This reliance upon such presumption, is, therefore, a mode of defense which

shows itself at the hearing, upon a consideration of the whole case, and not from anything directly alleged by the defendant in his pleadings.

In accordance with this comprehensive view of pleading as a practical scheme, presenting for adjudication the full merits of equity causes, Chancellor Bland says, in the case of *Salmon v. Clagett*, "There are, then, five modes of defense of which a defendant may avail himself, according to the nature and exigencies of his case: 1, a demurrer; 2, a plea; 3, an answer, properly so called; 4, a negation or matter in avoidance embodied in the shape of an answer; and 5, a defense found at the hearing as the production of the whole case as then presented for adjudication. Each of these modes of defense is strikingly distinguishable from the rest, and it is of importance that they should, in no manner, nor in any stage of the proceedings, be confounded with each other."

If, after appearance, the defendant fails to make any defense whatever, process may be issued against him for the contempt, or the bill may be taken *pro confesso*. If he makes defense by answer, he must answer as fully as the bill requires. If he answers imperfectly or evasively, and the plaintiff wishes all the material matters of his bill fully answered, his remedy is by taking exceptions to the answer, which will bring the question of the insufficiency of the answer before the court. The determination of this question involves the preliminary inquiry, whether the plaintiff making the demand has the capacity to make it; and also, whether his case is such an one as gives him any claim to an answer. Every bill necessarily assumes that the plaintiff has these requisites. And an objec-



tion to the jurisdiction of the court, or to the capacity of the plaintiff, may be presented in any form, and at any time. It may be made by demurrer, plea or answer, or may be taken advantage of at the hearing. And a denial of the jurisdiction does not forbid all inquiry into the nature of the case, for a clear understanding of it is necessary, in order to determine whether it is a case of which the court has jurisdiction. And if the fact does not satisfactorily appear from the proceedings, on a plea, it may be established by proof on the trial of the plea, or upon a full disclosure at the hearing ; for, whenever it appears to the court that it has no jurisdiction of the case, or that the plaintiff has no capacity to demand what he asks, it should not compel the defendant to answer, or give relief to the plaintiff. These preliminary considerations necessarily enter into the question of the obligation of the defendant to answer, no matter when and how raised.

There is a question connected with the doctrine of the relation of discovery to defense, that should be considered at this point in the analysis of pleadings in equity. Discovery is only evidence in the suit, and to be evidence it must be under oath, because the unsworn testimony of a witness is not legal evidence, and cannot be received as such by the court, even with the consent of parties. Where, therefore, the plaintiff, by his bill, waives an oath to the answer, he does not ask for discovery, and whatever the defendant may file as his answer, even if it be an answer on oath (52 Ill. R. 510), is only a pleading putting in issue the allegations of the bill. Such an answer cannot be excepted to, because the right of exception pertains to discovery and not to defense. Where the

defense is insufficient, the demurrer is the remedy to test it as a pleading. Discovery is for the benefit of the plaintiff, and not of the defendant; and where the defendant has not answered fully, the plaintiff has a right, without any order of the court, to except, so as to obtain full discovery. Where the court allows a plea to stand for an answer, with liberty to except, where an answer on oath is not waived by the bill, the plaintiff is not obliged to except for a further answer, but may file his replication and take proofs in regard to the facts alleged in the bill, in the same manner as if the facts stated in the plea had been brought forward originally by answer. Where the bill waives an oath, and a plea is allowed to stand for an answer, liberty to except is never allowed in the order by the court, because the plaintiff has not called for discovery.

When a pleader makes, by answer, those defenses which, according to the respective functions of the different pleadings, should be made by plea, the defenses, though they may be less technical, must, nevertheless, be substantially in the form of a plea, and present the same logical opposition to the bill which they would do if made by plea. And in cases where the plea must be supported by an answer, the allegations which would constitute such answer must be made in support of the defenses, and appear as a part of the discovery made by the answer in response to the bill. Had this formal requisite of making defenses by answer been observed in the pleading in the case of *Bayley v. Adams*, Lord Eldon would not have been puzzled as he was. But the truth is, that though Lord Eldon was skillful in applying the principles of

equity to the exigencies of justice involved in equity causes, he was not, like Mitford, a master of equity pleading, hence his confusion in the case of *Bayley v. Adams*.

The Constitution of the United States declares that the judicial power of the United States shall extend to controversies between two or more States; and the judiciary act of September, 1789, by which the judicial power was organized by Congress, declares that the Supreme Court shall have exclusive jurisdiction of such controversies. And, as the Constitution recognizes as a fundamental principle of American jurisprudence, the distinction between law and equity, the Supreme Court has adopted common law procedure for common law cases, and equity procedure for equity cases, as these different procedures had been established in England, from which we had derived our twofold jurisprudence. Hence, because questions concerning the boundaries of manors, lordships and counties palatine, were cognizable in the High Court of Chancery of England, by analogy, the Supreme Court has adopted equity pleading and practice as appropriate to controversies in regard to their boundaries between the sovereign States of the federal union. This was settled, as the proper practice, in the case of *Rhode Island v. Massachusetts* (12 Peters' R. 735-739, anno 1838; 14 Peters' R. 257, anno 1840). In that case, Chief Justice Taney said: "It is the duty of the court to mold the rules of chancery practice in such manner as to bring the case to a final hearing on its merits. In ordinary cases between individuals, the Court of Chancery has always exercised an equitable discretion, in relation to its rules of pleading, wherever

it has been found necessary to do so for the purposes of justice." So that it is the settled doctrine of federal jurisprudence, that a question of boundary between two sovereign States of our federal union, litigated in the Supreme Court, is one of equity jurisdiction and governed by equity pleading and practice. This enhances the importance of equity procedure.

The aim of this dissertation, as a supplement to the treatise of Mitford, is to exhibit equity pleading as a coherent system of harmonious principles and definite forms with special functions, all co-operating to present cases in equity in so definite a manner that they can be conducted to a final hearing upon their full merits, and at the same time to expose the errors of decisions of courts that have introduced perplexities into practice, because of confounding the respective functions of the plea and the answer, instead of adhering to the logical principles of pleading in the original integrity of the system.

It should ever be borne in mind that the law does not consist of particular decisions, but of general principles which run through the cases and govern the decision of them. Especially ought this to be observed in regard to the system of pleading in both law and equity. The best treatises on every subject in law and in equity, but especially in law, have been more or less depreciated by editors in citing decisions of courts which tend rather to raise endless questions of doubt than to fix definite and unchanging principles that had been presented in the treatises as settled law. Such editorial work only diverts the mind of the student from law as a certain science, and keeps him ever

doubting, and never able to come to a knowledge of the true doctrines, and in practice genders only forensic strife. And the neglect of principles, and following cases, tends to bring both the bar and the bench to a low level as jurists.



A TREATISE  
ON THE  
PLEADINGS  
IN SUITS IN THE  
COURT OF CHANCERY  
BY ENGLISH BILL.

By JOHN MITFORD, Esq.  
THE LATE LORD REDESDALE.





## INTRODUCTION.

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*Of the extraordinary jurisdiction of the Court of Chancery; and of the manner in which suits to that jurisdiction are instituted, defended, and brought to a decision.*

THE chancery of England has various offices and jurisdictions. The most important jurisdiction is that which it exercises as a court of equity, usually styled its extraordinary jurisdiction, to distinguish it from those which are termed its ordinary jurisdictions, and are chiefly incident to its ministerial offices, and the privileges of its officers.

The exercise of this extraordinary jurisdiction by courts distinct from those usually styled courts of common law, to which the ordinary administration of justice in civil suits is intrusted, seems to be, in a great degree, a peculiarity in the jurisprudence of this country, but pervading the whole system of its judicial polity. The origin of these courts is involved in great obscurity;\* their authority has been formerly questioned, and the subjects and limits of their jurisdiction were then but imperfectly ascertained. Time has given

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\* On this subject, see Mr. Spence's very learned work on "The Equitable Jurisdiction of the Court of Chancery." See, also, Campbell's "Lives of the Lord Chancellors of England," vol. I, Introduction, 4th edition.

them full establishment, and their powers and duties have become fixed and acknowledged. If any doubt on the extent of their duties has occurred of late years, it has principally arisen from the liberality with which the courts of common law have noticed and adopted principles of decision established in courts of equity; a liberality generally conducive to the great ends of justice, but which may lead to great inconvenience, if the whole system of the administration of justice by courts of equity, the extent of their powers and means of proceeding, the subservience of their principles of decision to the principles of the common law, the preference which they have allowed to common law rights where in conscience the parties have stood on equal grounds, and the defect in the powers of the courts of common law arising from their mode of proceeding, should not be fully considered, in all their consequences.<sup>1</sup>

In the construction of every system of laws, the principles of natural justice have been first considered; and the great objects of municipal laws have been to enforce the observance of those principles, and to provide a positive rule where some rule has been deemed necessary or expedient and natural justice has prescribed none. It has also been an object of municipal law to establish modes of administering justice.

The wisdom of legislators in framing positive laws to answer all the purposes of justice has ever been found unequal to the subject; and therefore, in all countries, those to whom the administration of the laws has been intrusted have been compelled to have recourse to natural principles to assist them in the

<sup>1</sup> See Lord Hardwicke's judgment in *Wortley and Birkhead*, 2 Ves. 573, 574. And see 6 Ves. 39.

interpretation and application of positive law, and to supply its defects; and this resort to natural principles has been termed judging according to equity. Hence a distinction has arisen in jurisprudence between positive law and equity; but the administration of both has in most countries been left, at least in their superior courts, to the same tribunal. In prescribing forms of proceeding in courts of justice human foresight has also been defective; and therefore it has been commonly submitted to the discretion of the courts themselves, to vary or add to established forms as occasion and the appearance of new cases have required.

In England a policy somewhat different has prevailed. The courts established for the ordinary administration of justice, usually styled courts of common law, have, as in other countries, recourse to principles of equity in the interpretation and application of the positive law: but they are bound to established forms of proceeding; are in some degree limited in the objects of their jurisdiction; have been embarrassed by a rigid adherence to rules of decision, originally framed and in general retained for wise purposes, yet, in their application, sometimes incompatible with the principles of natural and universal justice, or not equal to the full application of those principles; and the modes of proceeding in those courts, though admirably calculated for the ordinary purposes of justice, are not in all cases adapted to the full investigation and decision of all the intricate and complicated subjects of litigation, which are the result of increase of commerce, of riches, and of luxury, and the consequent variety in the necessities, the ingenuity, and the craft of mankind. Their simplicity, clearness and precision are highly advantageous in the ordinary administration of justice; and to alter

them materially would probably produce infinite mischief: but some change would have been unavoidable if the courts of common law had been the only courts of judicature.

Early therefore in the history of our jurisprudence the administration of justice by the ordinary courts appears to have been incomplete, and to supply the defect the courts of equity have exerted their jurisdiction: assuming the power of enforcing the principles upon which the ordinary courts also decide, when the powers of those courts or their modes of proceeding are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming (contrary to the purpose of their original establishment) instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law, as in the case of trusts, is silent.<sup>1</sup> The courts of equity also administer to the ends of justice by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute pending a litigation; by preserving property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and

<sup>1</sup> Principles of decision thus adopted by the courts of equity, when fully established and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law. See judgment of Sir Joseph Jekyll, quoted

by Sir Thomas Clarke, in Blackst. Rep. 152. *Pluraque quæ usu fori comprobata, denique juris scripti auctoritatem propter vetustatem obtinuerunt.* Cic. de Invent. lib. 2, c. 22; Heinecc. de Edict. prætor. lib. 1, c. 6, p. 129; Story's Eq. Jur. c. 1, sec. 18.

oppressive litigation, and preventing unnecessary multiplicity of suits; and, without pronouncing any judgment on the subject, by compelling a discovery, or procuring evidence, which may enable other courts to give their judgment; and by preserving testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation.<sup>1</sup>

This establishment, as before observed, has obtained throughout the system of our judicial polity; most of the branches of that system having their peculiar courts of equity,<sup>2</sup> and the Court of Chancery assuming a general jurisdiction, which extends to cases not within the bounds or beyond the powers of other jurisdictions.<sup>3</sup>

<sup>1</sup> It is not a very easy task accurately to describe the jurisdiction of our courts of equity.\* This general description, though imperfect, and in some respects inaccurate, is offered only for the purpose of elucidating the following treatise, in the course of which the subject must be in many points more fully considered.

<sup>2</sup> Thus the Court of Exchequer, established for the particular purpose of enforcing the payment of debts due to the king, and incidentally administering justice to the debtors and accountants to the crown, has its own peculiar court of equity.† The courts of Wales, of the Counties Palatine, ‡ of London, of the Cinque Ports, and other particu-

lar jurisdictions, have also their peculiar courts of equity.

<sup>3</sup> The Court of Equity in the exchequer chamber is also frequently considered as a court of general jurisdiction, and in effect it is so, in a great degree, though in principle it is not. For its jurisdiction is in strictness confined to suits of the crown, and of debtors and accountants to the crown; and a suggestion, the truth of which the court will not permit to be disputed, "that its suitor is a debtor and accountant to the crown," is still used to give it more extensive jurisdiction. This practice, as well as a similar fiction used to give general jurisdiction to the common law court in the exchequer, and the fiction

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\* As to the nature of equity jurisprudence and the extent of equity jurisdiction, see Smith's Manual of Equity, Introduction, s. I; Adams' Doctrine of Equity, Introduction, 5th Am. ed.; Story's Eq. Jur. cc. I, II, III.

The mere fact that a case is in conformity with the principles of natural equity and justice is not sufficient to bring it within the jurisdiction of a court of equity. (2 Sumn. R. 409.)

† By the stat. 5 Vict. c. 5, s. 1, the equitable jurisdiction of the Court of Exchequer is transferred to the Court of Chancery.

‡ The courts of the county palatine of Chester and the Principality of Wales have been abolished by the stat. 11 Geo. IV and 1 Wm. IV, c. 70, s. 14.

The existence of this extraordinary jurisdiction, entirely distinct from the ordinary courts, though frequently considered as an enormity requiring redress, has perhaps produced a purity in the administration of justice which could not have been effected by other means; and it is in truth, in a great degree, a consequence of that jealous anxiety with which the principles and forms established by the common law have been preserved in the ordinary courts as the bulwarks of freedom, and of the absolute necessity of preventing the strict adherence to those principles and forms from becoming intolerable.

A suit to the extraordinary jurisdiction of the Court of Chancery, on behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition,<sup>1</sup> to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal;<sup>2</sup> or to the king himself in his Court of Chancery, in case the person holding the seal is a party,<sup>3</sup> or the seal is in the king's hands.<sup>4</sup> But if the suit is instituted on behalf of the crown,<sup>5</sup> or of those who partake of its preroga-

used to give jurisdiction to the Court of King's Bench in a variety of civil suits of which it has not strictly cognizance, may appear the objects of censure; but they have probably had the effect of preventing that abuse of power which is too often the consequence of the single jurisdiction of one supreme court.

<sup>1</sup> 9 Edw. IV, 41; Prac. Reg. p. 57, Wyatt's ed. This book, and other books of practice, are only cited where no other authority occurred, or where they might lead the reader to further information on the subject. The Prac-

tical Register is mentioned by Lord Hardwicke (2 Atk. 22) as a book, though not of authority, yet *better collected than most of the kind*.\*

<sup>2</sup> As to the authority of a lord keeper, see 5 Eliz. c. 18; and as to that of lords commissioners, see 1 W. & M. c. 21.

<sup>3</sup> 4 Vin. Ab. 385; L. Leg. Jud. in Ch. 44, 255, 258; Jud. Auth. M. R. 182; 2 Prax. Alm. Cur. Canc. 463; Ld. Chan. Jeffries against Witherly.

<sup>4</sup> 1 West. Symb. Cha. 194 b.

<sup>5</sup> 1 Roll. Ab. 373; Att. Gen. v. Vernon, 1 Vern. 272, 370.

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\* The "Forum Romanum" of Lord Chief Baron Gilbert should be studied by every student of equity jurisprudence. It casts a mixed light of principles and practice down the vista of equity jurisdiction, making modern practice more intelligible by its historical antecedents. (See Am. ed.)

tive,<sup>1</sup> or whose rights are under its particular protection, as the objects of a public charity,<sup>2</sup> the matter of complaint is offered to the court by way of information, given by the proper officer, and not by way of petition.<sup>3</sup> Except in some few instances,<sup>4</sup> bills and informations have been always in the English language; and a suit preferred in this manner in the Court of Chancery has been therefore commonly termed a suit *by English bill*, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court as a court of common law, which, till the statute of the 4th Geo. II, c. 26, were entered and enrolled, more anciently in the French or Norman tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

Every bill must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may either complain of some injury which the person exhibiting it suffers, and pray relief according to the injury; or, without praying relief, may seek a discovery of matter necessary to support or defend another suit;\* or although no actual injury is suffered, it may

<sup>1</sup> As to idiots and lunatics, see c. I, s. I.

<sup>2</sup> I C. in Cha. 158; Anon. 3 Atk. 276. See 1 Swanst. 292.

<sup>3</sup> On the subject of informations, see c. I, s. 3.

<sup>4</sup> There are some bills in early time in the French language. See Calendars of Proceed. in Chan., printed under authority of Commiss. on Public Records, 1827.

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\* It is not allowable in effect to unite in one bill, a bill for relief, and a bill for discovery on a matter which is quite distinct from that relief, although both be connected with the same circumstances. So that in a bill for a receiver, pending a litigation as to probate, a plaintiff cannot have a discovery in reference to the merits on that litigation. (*Wood v. Hitchings*, 3 Beav. 504.)

complain of a threatened wrong, and stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill, to defend himself against the injury whenever it shall be attempted to be committed. As the Court of Chancery has general jurisdiction in matters of equity not within the bounds or beyond the powers of inferior jurisdictions,<sup>1</sup> it assumes a control over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this, it requires the party injured to institute a suit in the Court of Chancery, the sole object of which is the removal of the former suit by means of a writ called a writ of *certiorari*; and the prayer of the bill used for this purpose is confined to that object.

The bill, except it merely prays the writ of *certiorari*, generally requires the answer of the defendant, or party complained of, upon oath. An answer is thus required, in the case of a bill seeking the decree of the court on the subject of the complaint, with a view to obtain an admission of the case made by the bill, either in aid of proof, or to supply the want of it; a discovery of the points in the plaintiff's case controverted by the defendant, and of the grounds on which they are controverted; and a discovery of the case on which the defendant relies, and of the manner in which he means to support it. If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant upon oath may be required to obtain an admission of the plaintiff's title, and a discovery of the claims of the defendant, and of the grounds on which those claims

<sup>1</sup> The court of equity in the exchequer chamber, though a particular, is not an inferior, jurisdiction.



are intended to be supported. When the sole object of a bill is a discovery of matter necessary to support or defend another suit, the oath of the defendant is required to compel that discovery. The plaintiff may, if he thinks proper, dispense with this ceremony, by consenting to or obtaining an order of the court for the purpose; and this is frequently done for the convenience of parties where a discovery on oath happens not to be necessary. And where the defendant is entitled to privilege of peerage, or as a lord of parliament, or is a corporation aggregate, the answer, in the first case, is required upon the honor of the defendant,<sup>1</sup> and in the latter, under the common seal.<sup>2</sup> \*

<sup>1</sup> Ord. in Chan. Ed. Bea. 105, 261; 18 Ves. 470; 1 Ves. 470; 1 Ves. & B. 187; 1 Jac. & W. 526. And see Robinson v. Lord Rokeby, 8 Ves. 601, as to Irish peers.

<sup>2</sup> It may be observed, that although in ordinary cases the answer is *required* upon oath, other sanctions are in certain instances allowed in practice: a Quaker puts in his answer upon his solemn affirmation and declaration (see 7 W. & M. c. 34; 8 Geo. I, c. 6; Ord. in Cha. Ed. Bea. 247; Wood v. Story, 1 P. Wms. 781; Marsh v. Robinson, 2

Anstr. 479); and so it appears does a Moravian (see 22 Geo. II, c. 30); and infidels are permitted to swear according to the forms of the religion which they profess, provided such forms constitute an appeal to the Supreme Being. See the well-known cases of Omychund v. Barker, 1 Atk. 21; s. c. 2 Eq. Cas. Abr. 397, and Ramkissenseat v. Barker, 1 Atk. 51. A Jew makes oath upon the Pentateuch (Robeley v. Langston, 2 Keble, 314; Anon. 1 Vern. 263); and a Mahometan upon the Koran. Stra. 1104.

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\* The answer of a corporation under seal will not avail the corporation as evidence at the hearing, as if by an individual on oath. An answer not under oath is merely a denial of the allegations of the bill, like the general issue at law, to put the complainant to the proof of such allegations. (5 Peters' R. 111; 6 Paige R. 59; Story Eq. Pl. s. 8750 c, Redfield ed.)

On a bill for discovery and relief, any members of the corporation, whether officers or simply corporators, may, so far as relates to discovery, be made defendants, and compelled to answer on oath. (1 Metcalf R. [Mass.] 237, 239.)

Where complainant, by his bill, waives an answer on oath, no answer or discovery in support of the plea is necessary; and the defendant may plead the stated account in bar of the suit, without setting forth a copy of it, where the plaintiff seeks to impeach the account of fraud or mistake,

To the bill thus preferred, unless the sole object of it is to remove a cause from an inferior court of equity, it is necessary for the person complained of either to make defense, or to disclaim all right to the matters in question by the bill. As the bill calls upon the defendant to answer the several charges contained in it, he must do so, unless he can dispute the right of the plaintiff to compel such an answer, either from some impropriety in requiring the discovery sought by the bill, or from some objection to the proceeding to which the discovery is proposed to be assistant; or unless by disclaiming all right to the matters in question by the bill he shows a further answer from him to be unnecessary.<sup>1</sup>

A defendant to a bill may have an interest to support the plaintiff's case, or his interest may not be adverse to that claim; he may be a mere trustee, or brought before the court in some character necessary to substantiate the suit, that there may be proper parties to it. In such cases, his answer may often be mere matter of form, submitting the subject of the suit to the judgment of the court; and if any act should be required to be done by him, desiring only to be indemnified by the decree of the court.

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<sup>1</sup> In some cases a defendant may be interest in the matters in question. (See compelled to answer, though he has no c. II, s. 2, part 1.)

and states he has no counterpart, and prays that it may be set forth in the answer. (7 Paige R. 573; 5 Paige R. 26; 3 Paige R. 566.) The reason of this rule is, that unsworn testimony of a witness is not legal evidence, and cannot be admitted by the court, even with consent of parties. The answer, therefore, as evidence, would be a nullity. And an answer in support of a plea is no part of the defense, but only evidence. Such a plea supported by an unsworn answer is a mere pleading to put in issue the allegations in the bill. (See 11 Paige, 543; 52 Ill. R. 510; also Dissertation on Pleading, prefixed to this edition.)

The grounds on which defense may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel the answer which the bill requires, are various. The subject of the suit may not be within the jurisdiction of a court of equity; or some other court of equity may have the proper jurisdiction; the plaintiff may not be entitled to sue by reason of some personal disability; if he has no such disability, he may not be the person he pretends to be; he may have no interest in the subject; or if he has an interest, he may have no right to call upon the defendant concerning it; the defendant may not be the person he is alleged to be by the bill; or he may not have that interest in the subject which can make him liable to the claims of the plaintiff; and, finally, if the matter is such as a court of equity ought to interfere in, and no other court of equity has the proper jurisdiction, if the plaintiff is under no personal disability, if he is the person he pretends to be, and has a claim of interest in the subject, and a right to call upon the defendant concerning it; if the defendant is the person he is alleged to be, and also claims an interest in the subject which may make him liable to the demands of the plaintiff, still the plaintiff may not be entitled, in the whole or in part, to the relief or assistance he prays; or if he is so entitled, the defendant may also have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties; the effecting complete justice, and finally determining, as far as possible, all questions concerning the subject, being the constant aim of courts of equity. Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill, and

may not be sufficient to protect him from making the discovery sought by it ; and where there is no ground for disputing the right of the plaintiff to the relief prayed, or if no relief is prayed, yet if there is any impropriety in requiring the discovery sought by the bill, or if the discovery can answer no purpose, the impropriety or immateriality of the discovery may protect the defendant from making it.

The defense which may be made on these several grounds may be founded on matter apparent on the bill, or on a defect either in its frame or in the case made by it ; and may on the foundation of the bill itself demand the judgment of the court whether the defendant shall be compelled to make any answer to the bill, and consequently whether the suit shall proceed ; or it may be founded on matter not apparent on the bill, but stated in the defense, and may on the matter so offered demand the judgment of the court whether the defendant shall be compelled to make any other answer to the bill, and consequently whether the suit shall proceed, except to try the truth of the matter so offered ; or it may be founded on matter in the bill, or on further matter offered, or on both, and submit to the judgment of the court on the whole case made on both sides ; and it may be more complex, and apply several defenses differently founded to distinct parts of the bill.

The form of making defense varies according to the foundation on which it is made, and the extent in which it submits to the judgment of the court. If it rests on the bill, and on the foundation of matter there apparent demands the judgment of the court whether the suit shall proceed at all, it is termed a demurrer ; if on the foundation of new matter offered, it demands the

judgment of the court whether the defendant shall be compelled to answer further, it assumes a different form, and is termed a plea; if it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is offered in a shape still different, and is simply called an answer. If the defendant disclaims all interest in the matters in question by the bill, his answer to the complaint made is again varied in form, and is termed a disclaimer. All these several forms of defense, and disclaimer, or any of them, may be used together, if applying to separate and distinct parts of the bill.

A demurrer, being founded on the bill itself, necessarily admits the truth of the facts contained in the bill, or in the part of the bill to which it extends; and therefore, as no fact can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the demurrer, which, if favorable to the defendant, puts an end to so much of the suit as the demurrer extends to. A demurrer,\* if allowed, consequently prevents any further proceeding.<sup>1</sup> A plea is also intended to prevent further pro-

<sup>1</sup> An amendment of a bill has been permitted by a court of equity after a demurrer to the whole bill had been allowed; but this seems not to have been strictly regular (2 P. Wms. 300); and it seems most proper, if the ground of demurrer may be removed by amendment, to make a special order, adapted to the circumstances of the case. See c. II, s. 2, pt. I.

\* That is, a demurrer to the whole bill. If a partial demurrer is allowed, the bill is still in court. And on allowing a demurrer for want of parties, the court generally gives leave to amend the bill. See 1 Perkins' Daniell's Ch. Pr. 597-599, 4th ed.

The Supreme Court of the United States has decided that a court may, instead of dismissing a bill brought to a hearing without making proper parties, give leave to make new parties; and it set aside the decree of the Circuit Court, and remanded the cause with leave to make new parties. (7 Cranch R. 99.) See 53d Rule of Practice in Equity of Supreme Court, in Appendix to this volume.

ceeding at large, by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defense the court will also give immediate judgment, supposing the facts stated in it to be true; but the judgment, if favorable to the defendant, is not definitive; for the truth of the plea may be denied by the plaintiff by a replication, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea. The replication in this case concludes the pleadings;<sup>1</sup> though, if the truth of the plea shall not be supported, further proceedings may be had, which will be noticed in a subsequent page.\* An answer generally controverts the facts stated in the bill, or some of them, and states other facts to show the rights of the defendant in the subject of the suit; but sometimes it admits the truth of the case made by the bill, and, either with or without stating additional facts, submits the question arising upon the case thus made to the judgment of the court. If an answer admits the facts stated in the bill, or such as are material to the plaintiff's case, and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the answer is considered as true, and the court will decide upon it. But if the answer does not admit all the facts in the bill material to the plaintiff's case, or states any fact which the plaintiff is not disposed to admit, the truth of the answer, or of any part of it, may be denied, and the sufficiency of the bill to ground the plaintiff's title to the relief he prays may be asserted, by a repli-

<sup>1</sup> See c. III.

<sup>2</sup> See c. II, s. 2, pt. 2.

cation, which in this case also concludes the pleadings according to the present<sup>1</sup> practice of the court. If a demurrer or plea is overruled upon argument, the defendant must make a new defense. This he cannot do by a second demurrer of the same extent, after one demurrer has been overruled; for although by a standing order of the court a cause of demurrer must be set forth in the pleading, yet if that is overruled, any other cause appearing on the bill may be offered on argument of the demurrer, and, if valid, will be allowed; the rule of the court affecting only the costs. But after a demurrer has been overruled, a new defense may be made by a demurrer less extended, or by plea, or answer; and after a plea has been overruled, defense may be made by demurrer, by a new plea, or by an answer: and the proceedings upon the new defense will be the same as if it had been originally made.<sup>2</sup> A disclaimer, neither asserting any fact, nor denying any right sought by the bill, admits of no further pleading.<sup>3</sup> If the sole object of a suit is to obtain a discovery, there can be no proceeding beyond an answer by which the discovery is obtained. A suit which only seeks to remove a cause from an inferior court of equity does not require any defense, and consequently there can be no pleading beyond the bill.

Suits thus instituted are sometimes imperfect in their frame, or become so by accident before their end has been obtained; and the interests in the property in litigation may be changed pending the suit in various ways. To supply the defects arising from any such circumstances, new suits may become necessary, to add to, or continue, or obtain the benefit of, the

<sup>1</sup> See c. III.

<sup>2</sup> See c. II, s. 2, pt. 1.

<sup>3</sup> See c. II, s. 2, pt. 3.

original suit. A litigation commenced by one party sometimes renders a litigation by another party necessary, to operate as a defense, or to obtain a full decision on the rights of all parties. Where the court has given judgment on a suit, it will in some cases permit that judgment to be controverted, suspended, or avoided by a second suit; and sometimes a second suit becomes necessary to carry into execution a judgment of the court. Suits instituted for any of these purposes are also commenced by bill; and hence arises a variety of distinctions of the kinds of bills necessary to answer the several purposes of instituting an original suit, of adding to, continuing, or obtaining, the benefit of a suit thus instituted, of instituting a cross-suit, and of impugning the judgment of the court on a suit brought to a decision, or of carrying a judgment into execution; and on all the different kinds of bills there may be the same pleadings as on a bill used for instituting an original suit.

It frequently happens that, pending a suit, the parties discover some error or defect in some of the pleadings; and if this can be rectified by amendment of the pleading, the court will in many cases permit it. This indulgence is most extensive in the case of bills, which being often framed upon an inaccurate state of the case, it was formerly the practice to supply their deficiencies, and avoid the consequences of errors, by special replications. But this tending to long and intricate pleading, the special replication requiring a rejoinder, in which the defendant might in like manner supply defects in his answer, and to which the plaintiff might surrejoinder, the special replication is now disused for this purpose, and the court will, in general, permit a plaintiff to rectify any error, or supply any



defect in his bill, either by amendment, or by a supplemental bill; and will also permit, in some cases, a defendant to rectify an error or supply a defect in his answer, either by amendment or by a further answer.

Summary jurisdiction has been given by authority of parliament to courts of equity in certain cases, arising incidentally from the provisions of acts of parliament, both public and private, without requiring the ordinary proceeding by bill or information, and substituting a simple petition to the court; the assistance of the court being required only to provide for the due execution of the provisions of such acts.

But by an act of the 52d of Geo. III, c. 101, a summary jurisdiction, on petition only, has been given in the case of abuses of trusts created for charitable purposes, which before were the subjects of information by the king's attorney general, to which the persons of whom complaint was made might make defense, according to the nature of the case stated in the information, by demurrer, plea, or answer, so that the court might have before it the whole case on which its judgment might be required, and to which evidence to be produced in support of or in answer to the complaint made might be properly applied.

The loose mode of proceeding authorized by this act was probably intended to save expense in investigating abuses of charities; but in practice it unavoidably led to great inconvenience; the court not having before it any distinct record to which its judgment might be properly applied, and especially with respect to those against whom complaint might be made, or those against whom no such complaint could be made, but whose interests might be affected

by the judgment of the court. This inconvenience became apparent in a case which was made the subject of appeal to the House of Lords, who finally determined that a jurisdiction so summary, and in which the proceedings were so loose, ought, in just construction of the act, to be confined to the simple case of abuse of a clear trust, not involving any question beyond the question of such abuse, and particularly not involving the interests of persons to whom such abuse of trust could not be imputed.<sup>1</sup> \*

In an inquiry into the nature of the several pleadings thus used, it seems most convenient to consider them in the order in which they have their effect, and consequently to treat: 1, of bills; 2, of the defense to bills, and therein of demurrers, pleas, answers, and disclaimers; 3, of replications; and, 4, to notice matters incidental to pleadings in general, and particularly the cases in which amendments of inaccurate or erroneous pleadings are permitted.

<sup>1</sup> Corp. of Ludlow v. Greenhouse, D. Proc. Feb. 1827.

\* On this subject, see 2 Perkins' Daniell's Ch. Pr. 1853, *et seq.*

## CHAPTER I.

### OF BILLS.

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#### SECTION I.

*By whom, and against whom, a bill may be exhibited.*

IN treating of bills, it will be proper to consider : I. The several persons who are capable of exhibiting a bill by themselves, or under the protection or in the name of others, and against whom a bill may be exhibited ; II. The several kinds and distinctions of bills ; and, III. The frame and end of the several kinds of bills. An information differing from a bill in little more than in name and form, its nature will be principally considered under the general head, of bills, and its peculiarities will be afterwards noticed.

It has been already observed that suits on behalf of the crown and of those who partake of its prerogative or claim its peculiar protection, are instituted by officers to whom that duty is attributed.<sup>1</sup> These are, in the case of the crown and of those whose rights are objects of its particular attention, the king's attorney<sup>2</sup> or solicitor general ;<sup>3</sup> and as these

<sup>1</sup> See above, p. 104.

<sup>2</sup> See 1 Swanst. 290, 291, 294, and Rex v. Austen, 8 Pri. Exch. R. 142. And the crown may be represented as plaintiff by the attorney general, and as defendant by the solicitor general, in the same suit, where there are conflicting

claims between the king and persons partaking of his prerogative, or under his peculiar protection. See Att. Gen. v. Mayor of Bristol, 3 Madd. 319 ; s. c. 2 Jac. & W. 294 ; Att. Gen. v. Vivian, 1 Russ. R. 226.

<sup>3</sup> See, as to the solicitor general,

officers act merely officially, the bill they exhibit is by way, not of petition or complaint, but of information to the court of the rights which the crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. If the suit does not immediately concern the rights of the crown, its officers depend on the relation of some person, whose name is inserted in the information, and who is termed the relator; and as the suit is carried on under his direction, he is considered as answerable to the court and to the parties for the propriety of the suit and the conduct of it.<sup>1</sup> It sometimes happens that this person has an interest in the matter in dispute, of the injury to which interest he has a right to complain. In this case his personal complaint being joined to and incorporated with the information given to the court by the officer of the crown, they form together an information and bill, and are so termed.<sup>2\*</sup> But if the

Wilkes's Case, 4 Burr. 2527; Sol. Gen. *v.* Dory, 6 May, 1735; and Sol. Gen. *v.* Warden and Fellowship of Sutton Coldfield, Mich. 1763, in chancery. This subject is particularly considered in part III, s. 4, of a manuscript treatise on the Star Chamber, in the British Museum, Harl. MSS. vol. I, No. 1226, mentioned in 4 Bl. Com. 267.

<sup>1</sup> Russ. R. 236. It appears, as intimated in the text, that it is not absolutely necessary, even in the instances there alluded to, that a relator should be named (2 Swanst. 520; 4 Dow. P. C. 8), although the practice of naming one seems to have been universally adopted. (1 Ves. jr. 247; 4 Dow. P. C. 8; 1 Sim. & Stu. 396.) But it may be remarked that the legislature, in certain special cases in which the right may be doubtful, has empowered the attorney general to institute a suit, by information, with-

out requiring that a relator should be named. See 59 Geo. III, c. 91, and see 1 Sim. & Stu. 396.

<sup>2</sup> See, as instances, Att. Gen. *v.* Oglender, 1 Ves. jr. 247; Att. Gen. *v.* Brown, 1 Swanst. 265; Att. Gen. *v.* Master and Fell. of Cath. Hall, 1 Jac. R. 381; Att. Gen. *v.* Heelis, 2 Sim. & Stu. 67; and Att. Gen. *v.* Vivian, 1 Russ. R. 226. If the relator should not be entitled to the equitable relief which he seeks for himself, the suit may nevertheless be supported on behalf of the crown (1 Swanst. 305); and upon an information and bill, the bill alone may be dismissed. See Att. Gen. *v.* Vivian, 1 Russ. R. 226. And see Att. Gen. *v.* Moses, 2 Madd. 294, a case of information and bill, in which the king having had no interest, the attorney general was an unnecessary party.

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\* An information and bill is improper, where the persons named as plaintiffs as well as relators have no individual interest, as where an infor-

suit *immediately* concerns the rights of the crown, the information is generally exhibited without a relator;<sup>1</sup> and where a relator has been named, it has been done through the tenderness of the officers of the crown towards the defendant, that the court might award costs against the relator, if the suit should appear to have been improperly instituted, or in any stage of it improperly conducted.<sup>2</sup> The queen consort, partaking of the prerogative of the crown, may also inform by her attorney.<sup>3</sup>

Suits on behalf of bodies politic and corporate, and of persons who do not partake of the prerogative of the crown, and have no claim to its particular protection, are instituted by themselves, either alone or under the protection of others. Bodies politic and corporate,<sup>4</sup> and all persons of full age, not being feme covert, idiot or lunatic, may by themselves alone exhibit a bill. A feme covert, if her husband is banished<sup>5</sup> or has abjured the realm,<sup>6</sup> may do so likewise; for she then may

<sup>1</sup> Att. Gen. *v.* Vernon, 1 Vern. 277, 370; Att. Gen. *v.* Crofts, 4 Bro. P. C. 136, Toml. ed.

<sup>2</sup> The propriety of naming a relator for this purpose, and the oppression arising from a contrary practice, were particularly noticed by Barron Perrot, in a cause in the Exchequer. Att. Gen. *v.* Fox. In that cause no relator was named; and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute. See 2 Swanst. 520; 1 Sim. & Stu. 397; 1 Russ. R. 236. If the relator should die, this court would would appoint another. Att. Gen. *v.* Powel, Dick. 355.

<sup>3</sup> 10 Edw. III, 179; Collins, 131; 2 Roll. Abr. 213.

<sup>4</sup> 3 Swanst. 138. As examples of suits by such bodies, see the Charitable Corporation *v.* Sutton, 2 Atk. 406; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 689; Mayor &c. of London *v.* Levy, 8 Ves. 398; City of London *v.* Mitford, 14 Ves. 41; Bank of England *v.* Lunn, 15 Ves. 569; Mayor of Colchester *v.* Lawton, 1 Ves. & B. 226; Dean and Chapter of Christchurch *v.* Simonds, 2 Meriv. 467; East India Comp. *v.* Keighley, 4 Madd. 10; Vauxhall Bridge Company *v.* Earl Spencer, 1 Jac. R. 64; President &c. of Magdalen College *v.* Sibthorp, 1 Russ. R. 154.

<sup>5</sup> 1 Hen. IV, 1; Sybell Belknap's Case, 2 Hen. IV, 7, a; 11 Hen. IV, 1, a, b.

<sup>6</sup> Thomas *v.* Weyland's Case, 19 Edw. I; 1 Inst. 133, a.

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mation and bill is filed by three of the court of assistants of a company in respect of a charity, and by two of the objects of the charity. (Att. Gen. *v.* East India Company, 11 Sim. 380.)

act in all respects as a feme sole.<sup>1</sup> Those, therefore, who are incapable of exhibiting a bill by themselves alone, are, 1, infants; 2, married women, except the wife of an exile, or of one who has abjured the realm; 3, idiots and lunatics.<sup>2</sup>

1. An infant is incapable *by himself* of exhibiting a bill, as well on account of his supposed want of discretion, as his inability to bind himself, and to make himself liable to the costs of the suit.<sup>3</sup> When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of the Court of Chancery, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is therefore termed his *next friend*. But as it frequently happens that the nearest relation of the infant himself withholds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the

<sup>1</sup> See *Newsome v. Bowyer*, 3 P. Wms. 37.

<sup>2</sup> It may seem that the disabilities arising from outlawry, excommunication, conviction of popish recusancy, attainder, and alienage, and those which formerly arose from villenage and profession, ought to be here noticed. Such of them as subsist do not, and the others did not, absolutely disable the person suffering under them from exhibiting a bill. Outlawry, excommunication,\* and conviction of popish recusancy,† are not in some cases any disability; and where

they are a disability, if it is removed by reversal of the outlawry, by purchase of letters of absolution in the case of excommunication, or by conformity in the case of a popish recusant, a bill exhibited under the disability may be proceeded upon. Attainder and alienage no otherwise disable a person to sue than as they deprive him of the property which may be the object of the suit. Villenage and profession were in the same predicament. See c. II, s. 2, pt. 2.‡

<sup>3</sup> *Turner v. Turner*, Strange, 708.

\* This disability is removed by the statute 53 Geo. III, c. 127, s. 3.

† This disability is removed by the statute 31 Geo. III, c. 32.

‡ See Story's Equity Pleadings, ss. 51, 52, 53, 54, 55, as to the disability of alienage.

court, in favor of infants, will permit any person to institute suits on their behalf;<sup>1\*</sup> and whoever acts thus the part which the nearest relation ought to take, is also styled the next friend of the infant, and as such is named in the bill.<sup>2</sup> The next friend is liable to the costs of the suit,<sup>3</sup> and to the censure of the court, if the suit is wantonly or improperly instituted:<sup>4</sup> but if the infant attains twenty-one, and afterwards thinks proper to proceed in the cause, he is liable to the whole costs.<sup>5</sup> If the person who thus acts as friend of

<sup>1</sup> *Andrews v. Cradock*, Prec. in Chan. 376; *Anon.* 1 Atk. 570; 2 P. Wms. 120; 1 Ves. jr. 195.

<sup>2</sup> 2 Eq. Cas. Abr. 239; 1 Ves. jr. 195.

<sup>3</sup> 4 Madd. 461; and see *Turner v. Turner*, 2 P. Wms. 297; s. c. on appeal, 2 Eq. Cas. Abr. 238; and *Strange*, 708. It is hence, of course, important to the defendant that the prochein amy, or next friend of the infant, be a person of substance (*Anon.* 1 Atk. 570); and, where the contrary appears to be the fact, on an application by the defendant before answer, he will be compelled to give security for costs, or another person will be appointed to sue in his stead. *Wale v. Salter*, Mosely, 47; *Anon.* Mosely, 86; *Anon.* 1 Ves. jr. 409; and see *Pennington v. Alvin*, 1 Sim. & Stu. 264.†

<sup>4</sup> And if the next friend of an infant do not proceed in the cause, this court, if it be desirable, will supersede him (*Ward v. Ward*, 3 Meriv. 706; 1 Jac. & W. 483); but the next friend of an infant cannot procure the substitution of another person to act in his place, without submitting to an investigation into his past conduct by the court. (*Melling v. Melling*, 4 Madd. 261). If the next friend should die, the court will take upon itself to appoint another. *Lancaster v. Thornton*, Ambl. 398; *Bracey v. Sandiford*, 3 Madd. 468.

<sup>5</sup> In *Turner and Turner* (2 P. Wms. 297), Lord King was first of opinion that upon a bill filed in the name of an infant who attained twenty-one, the plaintiff was liable to the costs, though he did not proceed after he attained

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\* Where a bill is filed by an annuitant, whose annuity is charged on residuary personal estate, and by infants who are the devisees of leaseholds, by the annuitant as their next friend, seeking payment of the annuity and the renewal of the leases for the infants, this is a misjoinder; for in this case one plaintiff seeks relief in which the other is not interested. Besides, if the annuitant were to die, the suit would abate, though as to that portion of it which she instituted as next friend, it would not abate but for the misjoinder. Again, supposing the court to decide the one portion of the suit in favor of the annuitant, and the other branch of it against the infants, they could procure no redress in case the annuitant, as their next friend, refused to take any further steps; or if the reverse were to take place, the infants might be delayed in the redress awarded to them by an appeal interposed by the annuitant on his own behalf. (*Anderson v. Wallis*, 4 Y. & C. Eq. Ex. 336; 1 Phil. 202.)

† As to this point, see 1 Perkins' Daniell's Ch. Pr. 76, *contra*.

an infant does not lay his case properly before the court, by collusion, neglect or mistake, a new bill may be brought on behalf of the infant; and if a defect appears on hearing of the cause, the court may order it to stand over, with liberty to amend the bill.<sup>1</sup>

The next friend of an infant plaintiff is considered as so far interested in the event of the suit that he or his wife<sup>2</sup> cannot be examined as a witness.\* If his examination is necessary for the purposes of justice, his name must be struck out of the bill, and that of another responsible person substituted, which the court, upon application, will permit to be done.<sup>3</sup> As some check upon the general license to institute a suit on behalf of an infant, if it is represented to the court that a suit preferred in his name is not for his benefit, an inquiry into the fact will be directed to be made by one of the masters; and if he reports that the suit is not for the benefit of the infant, the court will stay the proceedings.<sup>4</sup> And if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the court will direct an inquiry to be made in the same manner, which suit is most for his benefit;

that age; but upon a rehearing he changed his opinion, and dismissed the bill without costs, the prochein amy being dead. See *s. c.* *Strange*, 708, and 2 *Eq. Cas. Abr.* 238. It now seems, that if no misconduct (*Pearce v. Pearce*, 9 *Ves.* 548) be proved against the next friend, either in the institution or progress of the suit, the late infant, although he should not adopt it, will be liable to the costs. *Anon.* 4 *Madd.* 461.

<sup>1</sup> *Serle v. St. Eloy*, 1 *P. Wms.* 386; *Pritchard v. Quinchant*, *Ambl.* 147.

<sup>2</sup> *Head v. Head*, 3 *Atk.* 511.

<sup>3</sup> *Strange*, 708. As a general rule, it may be stated that this is done upon the next friend giving security for the costs incurred in his time. *Witts v. Campbell*, 12 *Ves.* 493; *Davenport v. Davenport*, 1 *Sim. & Stu.* 101.

<sup>4</sup> *Da Costa v. Da Costa*, 3 *P. Wms.* 140; *Strange*, 709; 2 *Eq. Cas. Ab.* 239. Such an inquiry will not be directed upon the application of the next friend himself. *Jones v. Powell*, 2 *Meriv.* 141.

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\* This disability would seem to be removed by the statute 6 & 7 *Vict. c. 85*.



and when that point is ascertained, will stay proceedings in the other suit.<sup>1</sup>

2. A married woman, being under the protection of her husband, a suit respecting her rights is usually instituted by them jointly.<sup>2</sup> \*But it sometimes happens that a married woman claims some right in opposition to rights claimed by her husband; and then the husband being the person, or one of the persons, to be complained of, the complaint cannot be made by him. In such case, therefore, as the wife being under the disability of coverture cannot sue alone, and yet cannot sue under the protection of her husband, she must seek other protection, and the bill must be exhibited in her name by her next friend,<sup>3</sup> who is also named in the bill in the same manner as in the case of an infant.<sup>4</sup> \* But a bill cannot, in the case of

<sup>1</sup> 1 Ves. 545; *Owen v. Owen*, Dick. 310; *Sullivan v. Sullivan*, 2 Meriv. 40; *Mortimer v. West*, 1 Swanst. 358; but it seems an application for this purpose should not be made, except in a strong case (*Stevens v. Stevens*, 6 Madd. 97); nor generally, after a decree in one of the suits. 1 Jac. R. 528.

<sup>2</sup> *Smith v. Myers*, 3 Madd. 474;

*Farrer v. Wyatt*, 5 Madd. 449; *Hughes v. Evans*, 1 Sim. & Stu. 185.

<sup>3</sup> *Griffith v. Hood*, 2 Ves. 452; *Lady Elibank v. Montolieu*, 5 Ves. 737; *Pennington v. Alvin*, 1 Sim. & Stu. 264.

<sup>4</sup> But, it seems, the next friend of a feme covert is not always, in the first instance, liable to the costs. *Strange*, 709; 2 Eq. Cas. Abr. 239; *Barlee v. Barlee*, 1 Sim. & Stu. 100.

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\* Husband and wife ought not to join as plaintiffs in a suit relating to the wife's separate property, but the bill ought to be filed by the wife alone, by her next friend, and her husband ought to be made a defendant: first, because the husband may have filed the bill in his wife's name without her knowledge or consent, and may, by collusion with the other parties, have the accounts improperly taken; and, secondly, because the wife being, as to her separate estate, entitled to prosecute a suit by her own authority, independently of her husband, a suit by her and her husband, which is considered as the suit of the husband alone, would not prevent her from instituting another suit; so that the defendant might be annoyed by two suits instead of one. If the objection is taken by demurrer, the court will give leave to amend, by striking out the name of the husband as plaintiff, and as next friend of his infant children, where he is named as such, and making him a defendant, and by inserting the

a feme covert, be filed without her consent.<sup>1</sup> The consent of an infant to a bill filed in his name is not necessary.<sup>2</sup>

3. The care and commitment of the custody of the persons and estates of idiots and lunatics are the prerogative of the crown, and are always intrusted to the person holding the great seal, by the royal sign-manual. By virtue of this authority, upon an inquisition finding any person an idiot or a lunatic, grants of the custody of the person and estate of the idiot or lunatic are made to such persons as the lord chancellor, or lord keeper, or lords commissioners for the custody of the great seal for the time being, think proper.<sup>3</sup> Idiots and lunatics, therefore, sue by the committees of their estates.<sup>4</sup> Sometimes, indeed, informations have been exhibited by the attorney general on behalf both of idiots and lunatics, considering them as under the peculiar protection of the crown,<sup>5</sup> and particularly if the interests of the committee have clashed with those of the lunatic.<sup>6</sup> But in such cases, a proper relator ought to be named;<sup>7</sup> and where a person found a

<sup>1</sup> Andrews v. Cradock, Prec. in Ch. 376; S. C. 1 Eq. Cas. Abr. 72; 1 Sim. & Stu. 265.

<sup>2</sup> Andrews v. Cradock, Prec. in Ch. 376.

<sup>3</sup> 3 P. Wms. 106, 107; *Ex parte* Pickard, 3 Ves. & Bea. 127.

<sup>4</sup> 1 Cas. in Chan. 19; Ridler v. Ridler, 1 Eq. Cas. Abr. 279; Prac. Reg. 272, Wy. ed.

<sup>5</sup> Att. Gen. v. Parkhurst, 1 Cas. in Chan. 112; Att. Gen. v. Woolrich, 1 Cas. in Chan. 153; 3 Bro. P. C. 633, Toml. ed.

<sup>6</sup> See Att. Gen. v. Panther, Dick. 748.

<sup>7</sup> Att. Gen. at relation of Griffith Vaughan, a lunatic, against Tyler and others, 11th July, 1764. On motion, ordered that a proper relator should be appointed, who might be responsible to the defendants for the costs of the suit. See Dick. 378; 2 Eden, 230. And see Att. Gen. v. Plumtree, 5 Madd. 452, though the case of a charity information.

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name of another person as next friend. (*Wake v. Parker*, 1 Keen, 59; *England v. Downs*, 1 Beav. 96; *Owden v. Campbell*, 8 Sim. 551; *Sigel v. Phelps*, 7 Sim. 239; *Thorp v. Yeates*, 1 Y. & C. Ch. C. 438; *Davis v. Prout*, 7 Beav. 288.)

lunatic has had no committee, such an information has been filed, and the court has proceeded to give directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee.<sup>1</sup>

Persons incapable of acting for themselves, though not idiots or lunatics, or infants, have been permitted to sue by their next friend, without the intervention of the attorney general.<sup>2</sup>

A bill may be exhibited against all bodies politic and corporate, and all persons, as well infants, married women, idiots and lunatics, as those who are not under the same disability, excepting only the king and queen.<sup>3</sup> But to a bill filed against a married woman her husband must also be a party, unless he is an exile, or has abjured the realm; and the committee of the estate of an idiot or lunatic must be made defendant with the person whose property is under his care. Where the rights of the crown are concerned, if they extend only to the superintendence of a public trust, as in the case already mentioned of a charity, the king's attorney general may be made a party to sustain those rights; and in other cases, where the crown is not in possession, a title vested in it is not impeached, and its rights are only incidentally concerned, it has generally been considered that the king's attorney general may be made a party in respect of those rights, and the practice has been accordingly.<sup>4</sup> But where the crown is in possession, or any title is vested

<sup>1</sup> Att. Gen. on behalf of Maria Lepine, a lunatic, at the relation of John Fox; and also Maria Lepine against Earl and Countess Howe and others; 26 March, 1793—3 Apr. 1794.

<sup>2</sup> Eliz. Liney, a person deaf and dumb, by her next friend, against Thomas Witherly and others. In chan-

cery—Decree, 1 Dec. 1760. Decree on supplemental bill, 4 March, 1779. See *Wartnaby v. Wartnaby*, 1 Jac. R. 377.

<sup>3</sup> See c. II, s. 1.

<sup>4</sup> See *Balch v. Wastall*, 1 P. Wms. 445; *Dolder v. Bank of England*, 10 Ves. 352.

in it which the suit seeks to divest or affect, or its rights are the immediate and sole object of the suit, the application must be to the king by petition of right,<sup>1</sup> upon which, however, the crown may refer it to the chancellor to do right, and may direct that the attorney general shall be made a party to a suit for that purpose; or a suit may be instituted in the Court of Exchequer, as a court of revenue and general auditor for the king, and relief there obtained, the attorney general being made a party.<sup>2\*</sup> The queen has also the same prerogative.<sup>3</sup>

A suit may affect the rights of persons out of the jurisdiction of the court, and consequently not compellable to appear in it.† If they cannot be prevailed upon to make defense to the bill, yet, if there are

<sup>1</sup> See legal juric. in Chan., stated p. 113. Reeve against Att. Gen., mentioned in Penn against Lord Baltimore, 1 Ves. 445, 446. The bill was dismissed 27 Nov. 1747, by Lord Hardwicke.

<sup>2</sup> Lord Hardwicke, in Huggins and York Buildings Company, in Chancery, 24 Oct. 1746; Pawlet v. Att. Gen. in

Excheq. Hardres, 465; Poole v. Att. Gen. Excheq. Parker, 272; Wilkes's Case, Exch. Lane, 54.

<sup>3</sup> 2 Roll. Abr. 213. But see Staunf. Præer. 75, 6; 9 Hen. VI, 53. Writ of annuity against Joan, queen dowager of Hen. IV.

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\* See note (3), p. 103.

† A foreign sovereign may sue in equity. (Hullett v. The King of Spain, 2 Bligh, 31 [N. S.])

In a suit against a sovereign prince, who is also a British subject, the bill ought, upon the face of it, to show that the subject-matter of it constitutes a case on which a sovereign prince is liable to be sued as a subject. (The Duke of Brunswick v. The King of Hanover, 6 Beav. 1.)

A foreign state may sue in equity. But it must sue in the names of some public officers who are entitled to represent its interests, and upon whom process can be served on the part of the defendants, and who can be called upon to answer the cross-bill of the defendants. And therefore, where a bill was filed by "the government of the state of Columbia, and Don M. J. Hurtado, a citizen of that state, and minister plenipotentiary from the same," &c., a general demurrer to the whole bill was allowed. (The Columbian Government v. Rothschild, 1 Sim. 94.)

A foreign prince or state may sue in the courts of law and equity of the United States. (1 Peters' Cir. C. R. 276; 1 Kent Com. 297, n. 6.)

other parties, the court will in some cases proceed against those parties;<sup>1</sup> and if the absent parties are merely passive objects of the judgment of the court, or their rights are incidental to those of parties before the court, a complete determination may be obtained;<sup>2</sup> but if the absent parties are to be active in the performance of a decree, or if they have rights wholly distinct from those of the other parties, the court cannot proceed to a determination against them.<sup>3</sup>

## SECTION II.

### *Of the several kinds and distinctions of bills.\**

It has been mentioned in the introduction that different kinds of bills are used to answer the several purposes of instituting an original suit, of adding to, continuing, or obtaining the benefit of a suit thus instituted, of instituting a cross-suit, of impugning the judgment of the court on a suit brought to a decision, and of carrying a judgment into execution. The

<sup>1</sup> *Williams v. Whinyates*, 2 Br. C. C. 399; 1 Sch. & Lefr. 240; 16 Ves. 326.

<sup>2</sup> In *Att. Gen. at relation of University of Glasgow against Baliol College and others*, in Chancery, Dec. 11th, 1744, which was an information filed, impeaching a decree made in 1699, on an information by the attorney general against the trustees of a testator, his heirs at law, and others, to establish a will, and a charity created by it, alleging that the decree was contrary to the will, and that the university of Glasgow had not been made party to the suit;

Lord Hardwicke overruled the latter objection, as the university of Glasgow was a corporation out of the reach of the process of the court, which warranted the proceeding without making that body party to the suit. See *Walley v. Whalley*, 1 Vern. 487; *Rogers v. Linton*, Bunb. 200; *Quintine v. Yard*, 1 Eq. Cas. Abr. 74.

<sup>3</sup> See *Fell v. Brown*, 2 Bro. C. C. 276. Hence there sometimes arises an absolute defect of justice, which seems to require the interposition of the legislature.

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\* See *Dissertation on Pleadings in Suits in Equity*, prefixed to this edition.

several kinds of bills have been usually considered as capable of being arranged under three general heads: I. Original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests. II. Bills not original which are either an addition to, or a continuance of an original bill, or both. III. Bills which, though occasioned by or seeking the benefit of a former bill, or of a decision made upon it, or attempting to obtain a reversal of a decision, are not considered as a continuance of the former bill, but in the nature of original bills. And though this arrangement is not, perhaps, the most perfect, yet, as it is nearly just, and has been very generally adopted in argument, and in the books of reports and of practice, it will be convenient to treat of the different kinds of bills with reference to it.

I. A bill may pray relief against an injury suffered, or only seek the assistance of the court to enable the plaintiff to defend himself against a possible future injury, or to support or defend a suit in a court of ordinary jurisdiction. Original bills have, therefore, been again divided into bills praying relief, and bills not praying relief. An original bill praying relief may be: 1. A bill praying the decree or order of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited. 2. A bill of interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons for the safety of the persons exhibiting the bill. 3. A bill praying the writ of *certiorari* to

remove a cause from an inferior court of equity. An original bill not praying relief may be : 1. A bill to perpetuate the testimony of witnesses. 2. A bill for discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power.

II. A suit imperfect in its frame, or become so by accident before its end has been obtained, may, in many cases, be rendered perfect by a new bill, which is not considered as an original bill, but merely as an addition to or continuance of the former bill, or both. A bill of this kind may be : 1. A supplemental bill, which is merely an addition to the original. 2. A bill of revivor, which is a continuance of the original bill when by death some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone. 3. A bill both of revivor and supplement, which continues a suit upon an abatement, and supplies defects arisen from some event subsequent to the institution of the suit.

III. Bills for the purposes of cross-litigation of matters already depending before the court, of controverting, suspending, avoiding or carrying into execution a judgment of the court, or of obtaining the benefit of a suit which the plaintiff is not entitled to add to or continue for the purpose of supplying any defects in it, have been generally considered under the head of bills in the nature of original bills, though occasioned by or seeking the benefit of former bills : and may be, 1. A cross-bill, exhibited by the defendant in a former bill, against the plaintiff in the same bill, touching some matter in litigation in the first bill.

2. A bill of review to examine and reverse a decree made upon a former bill, and signed by the person holding the great seal, and enrolled, whereby it has become a record of the court. 3. A bill in the nature of a bill of review, brought by a person not bound by the former decree. 4. A bill to impeach a decree upon the ground of fraud. 5. A bill to suspend the operation of a decree on special circumstances, or to avoid it on the ground of matter arisen subsequent to it. 6. A bill to carry a decree made in a former suit into execution. 7. A bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill. 8. A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in other cases which do not admit of a continuance of the original bill, or after the suit is become defective without abatement, in cases which do not admit of a supplemental bill to supply that defect.

### SECTION III.

#### *Of the frame and end of the several kinds of bills and of informations.*

The several kinds of bills have been already considered as divided into three classes. In the first class have been ranked original bills; in the second, bills not original; in the third, bills in the nature of original bills, though occasioned by former bills. The frame and end of the several kinds of bills will be treated with reference to this distribution, and the



peculiarities of informations will be considered under a fourth head.

1. Original bills have been mentioned as again divisible into bills praying relief, and bills not praying relief.

Original bills praying relief have been ranked under three heads. 1. Original bills praying the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited. 2. Bills of interpleader. And, 3. Certiorari bills. Bills of the first kind are the bills most usually exhibited in the court; and as the several other kinds of bills are either consequences of this, or very similar to it in many respects, the consideration of bills of this kind will in a great measure involve the consideration of bills in general.

1. An original bill, praying the decree of the court touching rights claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited, must show the rights of the plaintiff, or person exhibiting the bill; by whom, and in what manner, he is injured; or in what he wants the assistance of the court; and that he is without remedy, except in a court of equity, or at least is properly relievable, or can be most effectually relieved there. Having thus shown the plaintiff's title to the assistance of the court, the bill may pray, that the defendant, or person against whom the bill is exhibited, may answer upon oath the matters charged against him; and it may also pray the relief or assistance of the court which the plaintiff's case entitles him to. For these purposes, the bill must pray, that a writ, called a writ of subpoena, may issue under

the great seal, which is the seal of the court, to require the defendant's appearance, and answer to the bill; unless the defendant has privilege of peerage, or is a lord of parliament, or is made a defendant as an officer of the crown. In the case of a peer or peeress, or lord of parliament, the bill must first pray the letter of the person holding the great seal, called a letter missive, requesting the defendant to appear to and answer the bill;<sup>1</sup> and the writ of subpoena only in default of compliance with that request. And if the attorney general is made a defendant as an officer of the crown, the bill must pray, instead of the writ of subpoena,<sup>2</sup> that he, being attended with a copy, may appear and put in an answer. It is usual to add to the prayer of the bill a general prayer of that relief which the circumstances of the case may require; that if the plaintiff mistakes the relief to which he is entitled, the court may yet afford him that relief to which he has a right.<sup>3</sup>\* Indeed it has been said, that a prayer of general relief, without a special prayer of the particular relief to which

<sup>1</sup> This mark of courtesy is in respect of peerage generally (see *Lord Milsington v. Earl of Portmore*, 1 Ves. & B. 419), and is to be observed towards Scotch peers (see *Act of Union with Scotland*, 5 & 6 Anne, c. 8, art. 23), and Irish peers not members of the House

of Commons. See *Act of Union with Ireland*, 39 & 40 Geo. III, c. 67, art. 4, and *Robinson v. Lord Rokeby*, 8 Ves. 601.

<sup>2</sup> See *Barclay v. Russell*, Dick. 729; s. c. 3 Ves. 424.

<sup>3</sup> *Hollis v. Carr*, 2 Mod. 86.

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\* Where a bill prays that account may be taken of the dealings and transactions between the plaintiff and the defendant, who has brought an action against the plaintiff, and that the defendant may be decreed to pay to the plaintiff what shall appear to be due to him upon taking such account, the plaintiff being ready and willing to pay what, if anything, shall appear to be due from him to the defendant, the court will not decree a set-off, because with such relief the relief prayed for is totally inconsistent; for in the case of a set-off, the defendant would not be ordered to pay the plaintiff the balance, but the balance would be directed to be applied in satisfaction of the damages, if any, which the defendant would otherwise be entitled to receive. (*Rawson v. Samuel*, Cr. & Phil. 161.)

the plaintiff thinks himself entitled, is sufficient;<sup>1</sup> and that the particular relief which the case requires may, at the hearing, be prayed at the bar.<sup>2</sup> But this relief must be agreeable to the case made by the bill,<sup>3</sup> and not different from it;<sup>4</sup> and the court will not in all cases be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced. If, therefore, the plaintiff doubts his title to the relief he wishes to pray, the bill may be framed with a double aspect; that if the court determines against him in one view of the case, it may yet afford him assistance in another.<sup>5</sup>†

<sup>1</sup> See *Cook v. Martyn*, 2 Atk. 3. The report of this case is apparently very inaccurate. See 1 Eden R. 26; 11 Ves. 574.

<sup>2</sup> See *Wilkinson v. Beal*, 4 Madd. 408.

<sup>3</sup> *Beaumont v. Boulton*, 5 Ves. 485; *Hiern v. Mill*, 13 Ves. 114; 2 Sch. & Lefr. 10, 729; 3 Swanst. 208, note.

<sup>4</sup> 2 Atk. 141; 3 Atk. 132; 1 Ves. jr. 426; 2 Ves. 299; *Birch v. Corbin*, 9 Dec. 1784, in Chan. 1 Ves. jr. 426; *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Palk v. Lord Clinton*, 12 Ves. 48.

<sup>5</sup> 2 Atk. 325. And see *Perry v. Phelps*, 17 Ves. 173.

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\* The plaintiff may have such relief, under the prayer for general relief, as the statement of his case entitles him to ask. (*Topham v. Columbine*, Tambl. 135; *Meller v. Minet*, Ib. 487.)

But after stating certain grounds for relief in the bill, he cannot have relief upon other grounds not pointed out in the bill, because that would be a surprise upon the defendant. And hence where an equitable mortgagee seeks relief against elegits on the ground of fraud, no relief can be given on the general ground, real or supposed, that an equitable mortgage has priority over a title by elegit under a judgment subsequent to the mortgage, where no case is made by the bill for relief on that ground; although, indeed, there is a charge that the plaintiff is entitled to priority in respect of the equitable mortgage over the elegits, and a prayer corresponding to such charge, but such charge does not clearly point out the general ground above mentioned as a ground for relief, distinct from that of fraud, so as to entitle the plaintiff at the hearing to ask for relief upon that general ground. (*Whitworth v. Gaugain*, Cr. & Phil. 325.)

† Where a bill is filed against certain members of a club, for the recovery of money belonging to the club, and it prays that the money may be paid to the plaintiff, "or otherwise as the court may direct;" in such case, if it ought not to be paid to the plaintiff, the court will take care that it is paid

Upon an information by the attorney general on behalf of a charity, the court will give the proper directions as to the charity, without regarding the propriety or impropriety of the prayer of the information.<sup>1</sup>

All persons interested in the subject of the suit ought generally to be parties,<sup>2</sup> if within the jurisdiction of the court.<sup>3</sup> Who are the necessary parties to a suit will be considered in the next chapter, in treating of demurrers; but if any necessary parties are omitted, or unnecessary parties are inserted, the court, upon

<sup>1</sup> *Att. Gen. v. Jeanes*, 1 Atk. 355; 1 Ves. 43, 72, 418; *Att. Gen. v. Breton*, 2 Ves. 426, 427; 11 Ves. 247, 367; 2 Jac. & W. 370; and it seems that a similar observation would in some instances apply upon a bill filed on behalf of an infant. *Stapilton v. Stapilton*, 1 Atk. 2; and see *Durant v. Durant*, 1 Cox, 58 (in which, on reference to the record, it appears that the daughter was an infant); *Reg. Lib.* 1783, p. 192.

<sup>2</sup> This proposition, although undoubtedly correct in relation to suits

for relief (*Pawlet v. Bishop of London*, 2 Atk. 296; *Poore v. Clarke*, 2 Atk. 515; 1 Ves. jr. 39; 7 Ves. 563; 1 Meriv. 262; 3 Meriv. 512), has been said, but upon somewhat doubtful authority, not to apply where discovery alone is sought. *Sangosa v. E. I. Comp.* 1 Eq. Cas. Abr. 170.

<sup>3</sup> As to mode of framing the bill where a defendant is out of the jurisdiction, see 1 Sch. & Lefr. 240; *Wilkinson v. Beal*, 4 Madd. 408.

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to the persons who ought to have the management of it. (*Richardson v. Hastings*, 7 Beav. 323.)

If a bill prays relief contingently against one defendant, only in the event of the court not giving relief against another defendant, it is demurrable. (*Seddon v. Connell*, 10 Sim. 79.)

If a bill by the directors of an insurance company prays that a policy may be delivered up to be canceled, or that the company may otherwise be relieved therefrom in such manner as the court may think fit, this is a submission to the judgment of the court as to the terms on which the relief is to be granted; and therefore it is not necessary that the plaintiffs should expressly offer to pay back the premiums received on the policy. (*Barker v. Walters*, 8 Beav. 92.)

Where a person conveys an estate, in trust, out of the rents, or by a sale or mortgage thereof, to pay a debt, and afterwards mortgages it, and the mortgagee files a bill, praying an execution of the trusts of the prior deed, and payment of the prior debt in the first place, and then of the mortgage debt due to himself, the bill is demurrable for want of an offer to redeem the prior incumbrancer, or to pay him any deficiency there may be in case the sum realized by the sale of the estate should be less than the prior debt. (*Cave v. Foulks*, 5 Law J. Ch. Rep. [N. S.] 206, M. R.)

application, will in general permit the proper alterations to be made. The cases in which this permission is usually granted, and the terms upon which it may be obtained, will be more particularly the subject of consideration in the fourth chapter.

It is the practice to insert in a bill a general charge, that the parties named in it combine together, and with several other persons unknown to the plaintiff, whose names, when discovered, the plaintiff prays he may be at liberty to insert in the bill. This practice is said to have arisen from an idea that without such a charge parties could not be added to the bill by amendment; and in some cases perhaps the charge has been inserted with a view to give the court jurisdiction. It has been probably for this reason generally considered, that a defendant demurring to a bill comprising persons whose interests are so distinct that they ought not to be made parties to the same bill, ought to answer the bill so far as to deny the charge of combination. The denial of combination usually inserted as words of course at the close of an answer, is a denial of unlawful combination; and it has been determined that a general charge of combination need not be answered.<sup>1</sup> An answer to a charge of unlawful combination cannot be compelled; and a charge of lawful combination ought to be specific to render it material. For where persons have a common right they may join together in a peaceable manner to defend that right; and though some of them only may be sued, the rest may contribute to the defense, at their common charge:<sup>2</sup> and if on the ground of such a combination the jurisdiction of a court of equity is attempted to be

<sup>1</sup> See *Oliver v. Haywood*, 1 Anstr. Exch. Rep. 82.

<sup>2</sup> See *Lord Howard v. Bell*, Hob. 91.

sustained, where the jurisdiction is properly at the common law, the combination ought to be specially charged, that it may appear to warrant the assumption of jurisdiction by a court of equity. From whatever cause the practice of charging combination has arisen, it is still adhered to, except in the case of a peer, who was never charged with combining with others to deprive the plaintiff of his right, either from respect to the peerage, or perhaps from apprehension that such a charge might be construed a breach of privilege.\*

The rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly yet succinctly alleged. Whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively,<sup>1</sup> and with precision;<sup>2</sup> † but the claims of the defendant may be

<sup>1</sup> It has been determined, upon demurrer, that it is not a sufficient allegation of fact in a bill, to state that the plaintiff is so informed. Lord Uxbridge *v.* Staveland, 1 Ves. 56.

<sup>2</sup> See *E. I. Comp. v. Henchman*, 1

Ves. jr. 287; *Cressett v. Mytton*, 3 Bro. C. C. 481; *Ryves v. Ryves*, 3 Ves. 343; *Mayor of London v. Levy*, 8 Ves. 398; *Carew v. Johnston*, 2 Sch. & Lefr. 280; *Albretcht v. Sussman*, 2 Ves. & Bea. 323.

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\* It is wholly unnecessary, and it is, therefore, the practice of some draftsmen to omit it. (See page 140, *infra*.)

† I. *With respect to a want of sufficient particularity—*

Where a mortgage debt has been due for more than twenty years, a general allegation that all interest has been paid is not sufficient to support a proof that interest was paid from time to time during the twenty years, so as to prevent the statute of limitations from operating; for, consistently with the truth of this allegation, the interest might have been paid in a lump. (*Gregson v. Hindley*, 10 Jur. 383—V. C. E.)

If a bill prays that the trustee of leasehold property may be declared to be a trustee for the plaintiff, as claiming through a person to whom it accrued by an intestacy, the bill must state or charge that the intestate did not dispose of or incumber the property, and that it was not applied in or required for the payment of his debts. (See *Stephens v. Frost*, 2 Y. & C. Eq. Ex. 297.)

In stating a title by descent in the plaintiff, it is necessary that all the

stated in general terms; and if a matter essential to the determination of the plaintiff's claims is charged to

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links which constitute the chain of descent should be stated. (*Baker v. Harwood*, 7 Sim. 373.)

An allegation that a defendant is the representative of a firm is not sufficient to admit proof of circumstances which might have made that party not only a representative, but actually the party carrying on the business. (*Schneider v. Lizardi*, 15 Law J. [N. S.] 435, M. R.)

Where a foreign instrument is intended to operate according to a law which is not known in England, and which, as foreign law, is to be proved as a fact to the cause, an allegation that such instrument is void is too vague. (*The Duke of Brunswick v. The King of Hanover*, 6 Beav. 59.)

Where a plaintiff means to rely on an admission made to a person whom he intends to examine as a witness, it is necessary that he should state or charge, not merely that such an admission was made, but that it was made to that person, in order to give the defendant an opportunity of cross-examining such person, or of otherwise meeting the case made upon the evidence. (*Austin v. Chambers*, 6 Cl. & Fin. 38.) And where a plaintiff proceeds against a defendant upon the ground of admissions made by the defendant of his having had notice, he ought to mention in the bill the date of such admissions, and the names of the persons to whom they were made, in order to give the defendant an opportunity of meeting the case. (*Earle v. Pickin*, 1 Russ. & M. 547.)

Letters proved in the cause, but not referred to in the pleadings, are inadmissible in evidence, even on the question of costs. (*Whitley v. Martin*, 3 Beav. 226.)

Conversations not put in issue cannot be used in evidence. But when communications are stated in the answer, the plaintiff has a right to show the real nature of those communications, although they are not referred to in the bill. (*Graham v. Oliver*, 3 Beav. 124. But see *Hughes v. Garner*, 2 Y. & C. Eq. Ex. 328.)

Where a bill seeks to restrain a defendant from prosecuting an action for a damage caused by a nuisance, and, as a ground for such relief, it alleges that he acquiesced in and encouraged the erection causing the nuisance, such an allegation is sufficient to let in evidence of such particular acts of encouragement as would amount to an equity against the defendant; and a demurrer for want of equity, on account of the generality of the allegation, will not lie, although it may turn out that there is not evidence of such an encouragement as will constitute an equity. (*Williams v. Earl of Jersey*, Cr. & Phil. 91.)

Where a bill charges generally that there are errors in an account, and that they appear in a certain report of an accountant in the plaintiff's possession, which the bill calls upon the defendant to inspect, but it does not

rest in the knowledge of the defendant, or must of necessity be within his knowledge, and is consequently the

specifically point out the errors, neither that report nor evidence of the errors pointed out in it can be recorded, although the report is stated, and the alleged errors in the account are explained in a cross-bill by the defendant. (*Shepherd v. Morris*, 4 Beav. 252.)

Where a bill impeaching a voluntary settlement on the ground of the indebtedment of the settlor, does not state the particulars of the debts, but refers to a schedule of debts in the Insolvent Debtors' Court, in aid of the suit, the existence of the debts is not sufficiently put in issue, as against an infant or a married woman, but an inquiry will be directed on the point. (*Townsend v. Westacott*, 2 Beav. 340.)

### II. *With respect to the mode of putting a specific allegation—*

A statement that "the defendant alleges, and the plaintiff believes the fact to be," is not a sufficient allegation of a material fact. (*Egremont v. Cowell*, 5 Beav. 620.)

A charge that the contrary of a pretense is the truth is equivalent to an allegation of the negative of the fact pretended. (*Harrison v. Wiltshire*, 4 Law J. Ch. Rep. [N. S.] 260, Lord Commissioner Shadwell.) So that a bill, by charging the contrary of a pretense that a right has not been established at law, sufficiently avers the establishment of the right at law. (*The Mayor, Aldermen and Burgesses of Rochester v. Lee*, 15 Law J. Ch. Rep. [N. S.] 97.)

If a bill insists that a will was a good execution of a power at law, and, if not, in equity, and then prays that the defect, if any, may be supplied against the defendant, the bill is demurrable: for the court cannot act upon an hypothetical bill, desiring relief either at law or in equity, according to the result of the argument. (*Edwards v. Edwards*, Jac. 335.)

### III. *With respect to the rule of construction—*

Allegations are to be taken most strongly against the party making them. (*Benson v. Hadfield*, 5 Beav. 546.)

And hence, in order to charge a party with a breach of trust, it is necessary that the case made against him by the bill should be such as to be incapable of being construed otherwise than as a case of a breach of trust. (*Attorney General v. The Mayor of Norwich*, 2 My. & Cr. 406.)

Where a party makes alternative allegations, the opposite party is entitled to adopt whichever of the alternative allegations he pleases. (*Williams v. Flight*, 5 Beav. 41.)

Where a bill of discovery is filed in aid of an action of covenant, which could not be sustained unless the person granting the lease containing the covenant had the legal estate, and the bill states that such person was "seized or otherwise well entitled," and there are no other expressions showing that he had the legal estate, the defendant has a right to take the



subject of a part of the discovery sought by the bill, a precise allegation is not required.<sup>1</sup> \*

As the bill must be sufficient in substance, so it must have convenient form.<sup>2</sup> The form of an original bill commonly used consists of nine parts. The first part is the address of the bill to the person holding the great seal, the terms of which are always prescribed by the court upon every change of the custody of the seal, or alteration in the style of the person to whom it is committed. In the second place are contained the names of the parties complainants, and their descriptions,<sup>3</sup> in which their abode is particularly required to be set forth, that the court and the parties defendants to the bill may know where to resort to compel obedi-

<sup>1</sup> See *Baring v. Nash*, 1 Ves. & Bea. 551.  
<sup>2</sup> 9 Edw. IV, 41; Prac. Reg. 57, Wy. ed.  
<sup>3</sup> It seems, however, that the de-

scription so given of a plaintiff is not considered to be an allegation of the truth thereof. See *Albrecht v. Sussman*, 2 Ves. & Bea, 323.

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statement most against the pleader, and as meaning that the lessor was "otherwise entitled," or had an equitable title only. (*Balls v. Musgrave*, 3 Beav. 284.)

Although it is a rule that an allegation is to be taken most strongly against the pleader, yet where a word may *per se* be understood in two different senses with equal fairness, and if understood in the one sense the bill would be demurrable, whereas, if understood in the other sense, the bill would be correctly framed, the former construction will be adopted: as where a bill for tithes is filed by a lessee thereof and by the vicar, and the bill states that the vicar "demised" the tithes to the lessee, and the vicar would be improperly made a coplaintiff if the demise were by deed, but not if it were by parol. (*Foot v. Bessant*, 3 Y. & C. Eq. Ex. 320.)

\* If a bill for relief is so vague that it does not state any certain case upon which a court of equity will grant relief, it will be demurrable for want of equity, although the plaintiff alleges his inability to state circumstances more definitely, and prays a discovery. (*Wormald v. De Lisle*, 3 Beav. 18.)

Allegations that an heir was brought up in poverty and without education, and kept in ignorance of his rights, and supplied with small sums of money, are too vague allegations of fraud to support a bill of discovery. A bill so framed is designated a fishing bill. (*Munday v. Knight*, 3 Hare, 497.)

ence to any order or process of the court, and particularly for payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit. The third part contains the case of the plaintiffs,\* and is commonly called the stating part of the bill.<sup>1</sup> In the fourth place is the general charge of confederacy against the persons complained of, which has been already mentioned as commonly inserted, though it seems unnecessary. Fifthly, if the plaintiffs are aware of a defense which may be made, and have any matter to allege which may avoid it, the general charge of confederacy is usually followed by an allegation that the defendants pretend or set up the matter of their defense, and by a charge of the matter which may be used to avoid it. This is commonly called the charging part of the bill, and is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiffs to admit; for which purpose the charge of pretense of the defendant is held to be sufficient.<sup>2</sup> Thus, if a bill is filed on any equitable ground by an heir who apprehends his ancestor has made a will, he may state his title as heir, and alleging the will by way of pretense of the defendant's claiming under it, make it a part of the case without admitting it.† The sixth

<sup>1</sup> See 11 Ves. 574.

<sup>2</sup> 3 Atk. 626; 11 Ves. 575. See, also, *Flint v. Field*, 2 Anstr. 543.

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\* There is no rule that a fact on which the plaintiff's title to relief depends, if introduced by way of charge, is not as well pleaded as if it were introduced in the shape of what is technically called a statement, where such charge is a specific averment of the fact. (*Houghton v. Reynolds*, 2 Hare, 264. And see *Harrison v. Wiltshire*, 4 Law J. [N. S.] 260, and *The Mayor of Rochester v. Lee*, 15 Law Ch. R. J. [N. S.] 97; *supra*, p. 136, note.)

† "The charging part of a bill is as necessary to be answered as the

part of the bill is intended to give jurisdiction of the suit to the court by a general averment that the acts complained of are contrary to equity, and tend to the injury of the complainants, and that they have no remedy, or not a complete remedy, without the assistance of the court; but this averment must be supported by the case shown in the bill, from which it must be apparent that the court has jurisdiction.\* The bill having shown the title of the persons complaining to relief, and that the court has the proper jurisdiction for that purpose, in the seventh place prays, that the parties complained of may answer all the matters contained in the former part of the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, to the information they may have received, and the belief they are enabled to form on the subject.† A principal end of an answer upon the oath of the defendants, is to supply proof of the matters necessary to support the case of the plaintiffs; and it is therefore required of the defendants, either to admit or deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the

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stating part. So far as the charges are material to anticipate and defeat a defense which may be set up by the defendant, they may be considered in the nature of a special replication. But the complainant has the same right to the defendant's answer to the charging part of the bill, to prove the truth of his special replication, as he has to an answer to the stating part, to prove the truth of that." (4 Paige, 373.)

\* The remark already made as to the charge of combination (note \* to page 136), is also applicable to the jurisdiction clause.

† Information does not mean only the information which the defendant actually at the time possesses, but also that which is obtainable from all the sources within his reach. The law considers him in possession of all the means of information which he has a right to possess; and he must resort to the proper means for enforcing the right. (Adams' Equity, p. 75.)

subject, or any recollection of it, and also to declare themselves unable to form any belief concerning it. But as experience has proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add to the general requisition that the defendants should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer.\* This is commonly termed the interrogating part of the bill; and as it was originally used only to compel a full answer to the matters contained in the former part of the bill, it

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\* Another object for which particular interrogatories are put is to call the matters of which discovery is sought to the remembrance of the defendant, where he might otherwise inadvertently, and not through willful evasion, state that he was unable to afford information.

The usual way of interrogating as to a document in a bill, is, to ask generally, whether it was not in the words and figures, or to the purport and effect thereinbefore in that behalf mentioned and set forth, or in some other and what words and figures, or to some other and what purport and effect? But if the defendant says he is unable to set forth whether it was to the purport and effect stated, or to what other purport or effect; and yet it is a document to which he himself was a party, or of the purport or effect of which it is probable that he has some knowledge, it may often be expedient to amend the bill by interrogating him step by step as to particulars expressed in the document, in order to direct his attention to each point, and suggest to his mind some points which he may remember when thus particularly interrogated as to them. In *Nelson v. Ponsford* (4 Beav.) Lord Langdale, M. R., observed, "It is probable that the defendant knows more than is stated in the answer. He has not, however, been interrogated, step by step, as to the rent and the other particulars of the agreement. \* \* \* \* It is possible he may be able to answer some of the particulars in detail, if put to him by amendment."

must be founded on those matters.<sup>1</sup> \* Therefore, if there is nothing in the prior part of the bill to warrant an interrogatory, the defendant is not compellable to answer it: a practice necessary for the preservation of form and order in the pleadings, and particularly to keep the answer to the matters put in issue by the bill. But a variety of questions may be founded on a single charge, if they are relevant to it.<sup>2</sup> Thus, if a bill is found against an executor for an account of the personal estate of his testator, upon the single charge that he has proved the will may be founded every inquiry which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required. The prayer of relief is the next and eighth part of the bill, and is varied according to the case made, concluding always with a prayer of general relief, at the discretion of the court.<sup>3</sup> To attain all the ends of the bill, it, ninthly and lastly, prays that process may issue<sup>4</sup> requiring the defendants to appear to and

<sup>1</sup> 1 Ves. 538 ; 6 Ves. 62 ; *Faulder v. Stuart*, 11 Ves. 296 ; *Bullock v. Richardson*, 11 Ves. 373 ; 11 Ves. 574.

<sup>2</sup> 1 Ves. 318 ; 11 Ves. 301.

<sup>3</sup> *Vide sup.* p. 132.

<sup>4</sup> They alone are defendants against whom process is prayed. See *Fawkes v. Pratt*, 1 P. Wms. 593 ; and *Windsor v. Windsor*, Dick. 707.

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\* "In the bill, the fact must be set out as it is, with all equitable circumstances, and proper interrogatories formed and put to the conscience of the defendant upon the fact and circumstances.

"But no interrogatories can be put that do not arise from some fact charged in the body of the bill ; or, if such interrogatories be put, the defendant may either demur to such interrogatories as having no foundation in the bill, or may omit to answer them ; and if there be exceptions for want of an answer to such interrogatories, the exceptions on a reference will be overruled with costs." (*Forum Romanum*, p. 214, Am. edition.)

answer the bill, and abide the determination of the court on the subject; adding, in case any defendant has privilege of peerage, or is a lord of parliament, a prayer for a letter missive before the prayer of process; and in case the attorney general, as an officer of the crown, is made a defendant, the bill, as before observed, instead of praying process against him, prays that he may answer it upon being attended with a copy. For the purpose of preserving property in dispute pending a suit, or to prevent evasion of justice, the court either makes a special order on the subject, or issues a provisional writ; as the writ of injunction, to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing any injurious act;<sup>1</sup> the writ of *ne exeat regno* to restrain the defendant from avoiding the plaintiff's demands by quitting the kingdom;<sup>2</sup> and other writs of a similar nature. When a bill seeks to obtain the special order of the court, or a provisional writ, for any of these purposes, it is usual to insert, immediately before the prayer of process, a prayer for the order or particular writ which the case requires; and the bill is then commonly named from the writ so prayed, as an injunction bill, or a bill for a writ of *ne exeat regno*.\* Sometimes the writ of injunction is

<sup>1</sup> It is a general rule, that the writ of injunction will not be granted unless prayed for by a bill which is already filed (*Savory v. Dyer*, Amb. 70), or under special circumstances, which the party applying undertakes to file forthwith (*M'Namara v. Arthur*, 2 Ball & B. 349); but there are exceptions to this general rule. See *Wright v. Atkyns*, 1 Ves. & Bea. 313; *Casamajor v. Strode*, 1 Sim. & Stu. 381; *Amory v. Brodrick*, 1 Jac. R. 530.

<sup>2</sup> It seems requisite that the writ of

*ne exeat regno* should be prayed for by bill (*Anon.* 6 Madd. 276); unless the application be made in a cause depending. *Collinson v. —*, 18 Ves. 353; *Moore v. Hudson*, 6 Madd. 218; see further on the subject of this writ, *Hyde v. Whitfield*, 19 Ves. 342; *Raynes v. Wyse*, 2 Meriv. 472; *Flack v. Holm*, 1 Jac. & W. 405, and the cases therein cited; *Leake v. Leake*, 1 Jac. & W. 605; *Graves v. Griffith*, 1 Jac. & W. 646; *Blaydes v. Calvert*, 2 Jac. & W. 211; *Pannell v. Taylor*, 1 Turn. R. 96.

\* A *ne exeat* will not be granted, unless prayed for by the bill, at least

sought, not as a provisional remedy merely, but as a continued protection to the rights of the plaintiff; and the prayer of the bill must then be framed accordingly.

These are the formal parts of an original bill as usually framed. Some of them are not essential, and particularly it is in the discretion of the person who prepares the bill to allege any pretense of the defendant, in opposition to the plaintiff's claims, or to interrogate the defendant specially. The indiscriminate use of these parts of a bill in all cases has given rise to a common reproach to practicers in this line, that every bill contains the same story three times told. In the hurry of business it may be difficult to avoid giving ground for the reproach; but in a bill prepared with attention the parts will be found to be perfectly distinct, and to have their separate and necessary operation.

The form of every kind of bill bears a resemblance to that of an original bill; but there are necessarily some variations, either arising from the purposes for which the bill is framed, or the circumstances under which it is exhibited; and those variations will be noticed, together with the peculiarities attending each kind of bill.

Every bill must be signed by counsel;<sup>1</sup> and if it

<sup>1</sup> *Dillon v. Francis*, Dick. 68; *French v. Dear*, 5 Ves. 547; 2 Ves. & B. 358; *Kirkley v. Burton*, 5 Madd. 378, n.; *Webster v. Threlfall*, 1 Sim. & Stu. 135; *Pitt v. Macklew*, 1 Sim. & Stu. 136, n. Lord Eldon declared that the signature of counsel to a bill is to be regarded as a security, that, judging from written instructions laid before him of the case of the defendant as well as of the plaintiff, there appeared to him, at the time of framing it, good ground of suit. 3d June, 1826, MSS. And see 3 Ves. 501.

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where it appears that the plaintiff at the time of filing the bill knew that the defendant intended to leave the kingdom. (*Sharp v. Taylor*, 11 Sim. 50.)

contains matter criminal, impertinent,\* or scandalous; such matter may be expunged, and the counsel ordered to pay costs to the party aggrieved.<sup>1</sup> But nothing relevant is considered as scandalous.<sup>2</sup> †

<sup>1</sup> Ord. in Chan. Ed. Bea. 165; Emerson v. Dallison, 1 Ch. Rep. 194; 6 Madd. 252.

<sup>2</sup> 2 Ves. 24; 15 Ves. 477.

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\* The setting forth important documents verbatim is not impertinence, but, if unnecessary, it may be visited in costs. (Lowe v. Williams, 2 Sim. & Stu. 574.)

Although it is not necessary, in an information, that relators should have any interest in the subject of the suit, yet a statement showing the nature of their interest is not impertinent, but is convenient, as, in the event of the information failing, the court is thereby enabled to make the parties pay the costs who are parties beneficially interested in the property. (Richards v. The Attorney General, 12 Cl. & Fin. 30.)

In Woods v. Woods (10 Sim. 215), the bill stated that a will in which there were several words misspelt, was "in the words and figures hereunder set forth, the inditing and spelling thereof being set forth with the greatest accuracy;" and Sir L. Shadwell, V. C., held that this preface was impertinent; and that it would have been sufficient to allege that the testator made his will "as follows:"—

For other cases on this subject, see note \* to p. 403, *infra*.

† Montriou v. Carrick, 6 Jur. 97, V. C. W.

In a bill impeaching the validity of a will, on the ground of undue influence over the testator exercised by a female who takes under such will, an allegation that prior to the date of the will she engaged in a criminal connection with him, and openly cohabited with him as if she had been his wife, is not scandalous or impertinent. (Anonymous, 1 My. & Cr. 78.)

So, if in a bill for setting aside a will on the ground of fraud and undue influence practiced on the testator by a female, there are allegations and interrogatories founded thereon, relating to her cohabitation with the testator, though a married man, they are not scandalous or impertinent, as they relate to that which may be most material in the chain of evidence of undue influence. (Evans v. Owen, 5 Law J. Ch. Rep. [N. S.] 74, M. R.)

In a bill against an executor, praying for a receiver and an injunction against the receipt of the assets by the executor, on account of his misconduct, it is not scandalous nor impertinent to enter into minute details in order to prove that the executor is a person of drunken, violent, and disorderly habits, and of great poverty; for these details, as evidence of



2. Where two or more<sup>1</sup> persons claim<sup>2</sup> the same thing,\* by different or separate interests,<sup>3</sup> and another person, not knowing to which of the claimants he ought of right to render a debt or duty,<sup>4</sup> or to deliver property in his custody;<sup>5</sup> fears he may be hurt by some of them,<sup>6</sup> he may exhibit a bill of interpleader against them.<sup>7</sup> † In this bill he must state his own rights, and their several claims; and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified. If any suits at law are brought against him, he may also pray that the claimants may be restrained from proceeding till the right is determined.<sup>8</sup>

As the sole ground on which the jurisdiction of the

<sup>1</sup> *Angel v. Hadden*, 15 Ves. 244.

<sup>2</sup> See 2 Ves. jr. 107; 15 Ves. 245; *Stevenson v. Anderson*, 2 Ves. & B. 407; *Morgan v. Marsack*, 2 Meriv. 107.

<sup>3</sup> And this may be where the claim of one is by virtue of an alleged legal, and that of the other upon an alleged equitable right. *Paris v. Gilham*, Coop. R. 56; *Martinius v. Helmuth*, 2 Ves. & Bea. 412 (2d ed.); *Morgan v. Marsack*, 2 Meriv. 107.

<sup>4</sup> 1 Eq. Cas. Abr. 80; 2 Ves. jr. 310; and see *Farebrother v. Prattent*, 1 Dan. Exch. R. 64; *Farebrother v. Harris*, Ibid. 68.

<sup>5</sup> This will not extend to cases of

bailment, where the parties may be compelled to interplead at law. See *Langston v. Boylston*, 2 Ves. jr. 101; 1 Meriv. 405. It may be observed that he must not himself claim any interest in the property. *Mitchell v. Hayne*, 2 Sim. & Stu. 63.

<sup>6</sup> 1 Eq. Cas. Abr. 80.

<sup>7</sup> 2 Eq. Cas. Abr. 173; *Cooper v. Chitty*, 1 Burr. 20; and see *Ib.* 37; *Prac. Reg.* 78; *Wy. ed.*

<sup>8</sup> *Prac. Reg.* 78, *Wy. ed.*; *E. I. Comp. v. Edwards*, 18 Ves. 376; *Croggon v. Symons*, 3 Madd. 130; see 1 *Jac. R.* 205.

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conduct, are material to the decree asked; and the court will not limit the number of instances which the plaintiff may adduce for the purpose of strengthening his case. (*Everet v. Prytherych*, 6 Jur. 3, V. C. B.)

\* *Glyn v. Duesbury*, 11 Sim. 139.

† It is essential to the character of a plaintiff to a bill of interpleader, that he should have no personal interest. (*Moore v. Usher*, 7 Sim. 383.)

A bill is not sustainable as a bill of interpleader where it raises a question between the plaintiff and one of the defendants: as where it alleges that interest on a sum secured by a policy is not due from the insurance company by whom the bill is filed. (*Bignold v. Audland*, 11 Sim. 24.)

court in this case is supported is the danger of injury to the plaintiff from the doubtful titles of the defendants, the court will not permit the proceeding to be used collusively to give an advantage to either party, nor will it permit the plaintiff to delay the payment of money due from him, by suggesting a doubt to whom it is due; therefore, to a bill of interpleader the plaintiff must annex an affidavit that there is no collusion between him and any of the parties; and if any money is due from him he must bring it into court, or at least offer so to do by his bill.<sup>2</sup>\*

3. When an equitable right is sued for in an inferior court of equity, and by means of the limited jurisdiction of the court the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court; the defendant<sup>3</sup> may file a bill in chancery, praying a special writ, called a writ of certiorari, to remove the cause into the court of chancery.<sup>4</sup> This species of bill, having no other object than to remove a cause from an inferior court of equity, merely states the proceedings in the inferior court, shows the incompetency of that court, and prays the writ of certiorari. It does not pray that the defendant may answer, or even appear to the bill, and

<sup>1</sup> 2 Eq. Cas. Abr. 173; *Errington v. Att. Gen. Bunb.* 303; 2 Ves. & B. 410; 1 Jac. R. 205.

<sup>2</sup> Prac. Reg. 79, Wy. ed.; *Earl of Thanet v. Patteson*, 3 Barnard, 247; 2 Ves. jr. 109; *Burnett v. Anderson*, 1 Meriv. 405; *Warrington v. Wheatstone*, 1 Jac. R. 202; *E. I. Comp. v. Edwards*, 18 Ves. 376; and see *Statham v. Hall*, 1 Turn. R. 30. In some instances it seems, that if an injunction should have been prayed it would not be granted unless the money should have been act-

ually paid into court. *Dungey v. Angove*, 3 Bro. C. C. 36. And it may be observed, that where the whole subject-matter of the suit is money, and the same has been paid into court, and the cause heard, the suit is at an end, so far as the plaintiff is concerned. See *Anon.* 1 Vern. 351; 3 Barnard, 250.

<sup>3</sup> *Sowton v. Cutler*, 2 Chan. Rep. 108.

<sup>4</sup> Prac. Reg. 41; *Boh. Priv. Lond.* 291; *Hilton v. Lawson*, Cary's Rep. 48; 1 Vern. 178.

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\* For further information on this subject, see *infra*, pp. 234-236.

consequently it prays no writ of subpoena.<sup>1</sup> The proceedings upon the bill are peculiar, and are particularly mentioned in the books which treat of the practice of the court.<sup>2</sup> It may seem improper to consider certiorari bills under the heads of bills praying relief; but as they always allege some incompetency of the inferior court, or injustice in its proceedings,<sup>3</sup> and seek relief against that incompetency or injustice, they seem more properly to come into consideration under this head than under any other. In case the court of chancery removes the cause from the inferior court, the bill exhibited in this court is considered as an original bill in the court of chancery, and is proceeded upon as such.

Original bills not praying relief have been already mentioned to be of two kinds, 1, bills to perpetuate the testimony of witnesses; and 2, bills of discovery.

1. A bill to perpetuate the testimony of witnesses must state the matter touching which the plaintiff is desirous of giving evidence, and must show that he has some interest in the subject,<sup>4</sup> and pray leave to examine witnesses touching the matter so stated, to the end that their testimony may be preserved and perpetuated.<sup>5</sup>

The bill ought also to show that the facts to which

<sup>1</sup> There are cases mentioned in the books apparently to the contrary; but they seem not to have been cases of bills praying merely the writ of certiorari. See 1 Cas. in Chan. 31.

<sup>2</sup> Prac. Reg. 82, Wy. ed.; *Stephenson v. Houlditch*, 2 Vern. 491; *Woodcraft v. Kinaston*, 2 Atk. 317; *Pierce v. Thomas*, 1 Jac. R. 54; *Edwards v. Bowen*, 2 Sim. & Stu. 514.

<sup>3</sup> 1 Vern. 442.

<sup>4</sup> *Mason v. Goodburne*, Rep. temp. Finch, 391; *Smith v. Att. Gen. Mich.* 1777, in Chan. As to the nature of the interest which is sufficient whereupon

to institute such a suit, see 6 Ves. 260, 261; *Lord Dursley v. Fitzhardinge*, 6 Ves. 251; *Allan v. Allan*, 15 Ves. 130.

<sup>5</sup> *Rose v. Gannel*, 3 Atk. 439; 1 Sch. & Lefr. 316. As relief is not prayed by a bill to perpetuate the testimony of witnesses (*Dalton v. Thomson*, Dick. 97), the suit is terminated by their examination; and of course, therefore, is not brought to a hearing. *Hall v. Hoddesdon*, 2 P. Wms. 162; 2 Ves. 497; *Anon. Ambl.* 237; *Vaughan v. Fitzgerald*, 1 Sch. & Lefr. 316; *Morrison v. Arnold*, 19 Ves. 670.

the testimony of the witnesses proposed to be examined is conceived to relate cannot be immediately investigated in a court of law, as in the case of a person in possession without disturbance;<sup>1</sup> or that before the facts can be investigated in a court of law the evidence of a material witness is likely to be lost, by his death, or departure from the realm.<sup>2</sup> \* To avoid objection to a bill framed on the latter ground it seems proper to annex to it an affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost;<sup>3</sup> a practice adopted in other cases of bills which have a tendency to change the jurisdiction of a subject from a court of law to a court of equity, and which will be afterwards more particularly noticed. It seems another requisite to a bill of this kind that it should state that the defendant has, or that he pretends to have, or that he claims, an interest to contest the

<sup>1</sup> See *Duke of Dorset v. Girdler*, Prec. in Chan. 531; 1 Sim. & Stu. 88.

<sup>2</sup> According to the latter part of this proposition, the right of action may be either in the plaintiff or defendant in equity. With reference to the defendant, the time of bringing the action depending upon his will, the situation of the plaintiff would be similar to that intimated in the former part of the proposition in the text (1 Sim. & Stu. 89); and with respect to the plaintiff, it must be understood to relate to the case of his not being able at present to sustain an action (*Cox v. Colley*, Dick. 55; 1 Sim. & Stu. 114); for, if he should have such present right, his object could only be what is technically termed an examination *de bene esse*, upon the ground of his having only one witness to a matter on which his claim depends, or,

if he have more, on the ground of their being aged, or too ill or infirm to attend in a court of law, and that he is therefore likely to lose their testimony before the time of trial (1 Sim. & Stu. 90), in which case it seems that it ought to be stated in the bill that the action was brought before the same was filed. *Angell v. Angell*, 1 Sim. & Stu. 83. On the general subject see the cases cited. 1 Sim. & Stu. 93, note, and *Teale v. Teale*, 1 Sim. & Stu. 385.

<sup>3</sup> *Earl of Suffolk v. Green*, 1 Atk. 450. An affidavit of like circumstances is also requisite where the object is merely the examination of the witnesses *de bene esse*. *Angell v. Angell*, 1 Sim. & Stu. 83. And see *Phillips v. Carew*, 1 P. Wms. 117; *Shirley v. Earl Ferrers*, 3 P. Wms. 77.

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\* Bills to perpetuate testimony seem divisible into two kinds; namely, bills to perpetuate testimony, specifically so called, and bills to take testimony *de bene esse*. For some points as to these, the reader is referred to Story's Eq. Pl. ss. 299-310.

title of the plaintiff in the subject of the proposed testimony.<sup>1</sup>

2. Every bill is in reality a bill of discovery; but the species of bill usually distinguished by that title is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery,\* though it may pray the stay of proceedings at law till the discovery should be made. This bill is commonly used in aid of the jurisdiction of some other court, as to enable the plaintiff to prosecute or defend an action at law,<sup>2</sup>† a proceeding before the king in council,<sup>3</sup> or any other legal proceeding of a nature merely civil<sup>4</sup> before a jurisdic-

<sup>1</sup> See Lord Dursley *v.* Fitzhardinge,  
6 Ves. 251.

<sup>2</sup> 5 Madd. 18.

<sup>3</sup> 1 Ves. 205.

<sup>4</sup> 2 Ves. 398.

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\* A bill which specifically prays a discovery only, but concludes with the prayer for general relief, is a bill for relief. But liberty will be given to amend by striking out the prayer for general relief. (*Angell v. Westcombe*, 6 Sim. 30.)

If, in the prayer of process, a bill prays that the defendant may abide such order and decree as the court may think proper to make, the bill is a bill for relief; and if, without such words, the bill would be a mere bill of discovery, it will be demurrable as a bill for relief. (*Ambury v. Jones*, 1 Younge, 199; *James v. Herriott*, 6 Sim. 428.)

But the words "abide such order therein," without the word "decree," will not have this effect; because the word "order" must be considered as meaning such an order as is consistent with the general scope of the case made by the bill as a mere bill of discovery. (*Baker v. Bramah*, 7 Sim. 17.)

A bill which, besides praying a discovery, prays for a commission to examine witnesses abroad in aid of the plaintiff's defense to an action, and for an injunction to restrain proceedings in the mean time, is not a bill for relief. And therefore a demurrer in bar of relief to such a bill, without mentioning discovery, is bad. (*Mills v. Campbell*, 2 Y. & C. Eq. Ex. 389.)

† A defendant at law may file a bill of discovery, whether the object of it is to sustain a defense to an action, or rebut the evidence in support of the action. (*Glascott v. The Governor & Company of the Copper Miners of England*, 11 Sim. 305.)

tion which cannot compel a discovery on oath;<sup>1</sup> except that the court has in some instances refused to give this aid to the jurisdiction of inferior courts.<sup>2</sup> \* Any person in possession of an estate, as tenant or otherwise, may file a bill against a stranger bringing an ejectment, to discover the title under which the ejectment may be brought,<sup>3</sup> though the plaintiff may not claim any title beyond that of mere tenant or occupant.† A bill of this nature must state the matter touching which a discovery is sought, the interest of the plaintiff and defendant in the subject, and the

<sup>1</sup> *Dunn v. Coates*, 1 Atk. 288; 1 Ves. 205; *Anon.* 2 Ves. 451.

<sup>2</sup> 1 Ves. 205.

<sup>3</sup> 1 Ves. 249.

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\* It has never been decided that a discovery will be enforced by the Court of Chancery in aid of the defense to a suit in a foreign court. But, at all events, it will not be enforced where the bill does not state that the plaintiff cannot have a discovery in the foreign court. (*Bent v. Young*, 9 Sim. 180.)

It has been decided in New York that a bill of discovery will lie to aid the prosecution or defense of a civil suit in a foreign tribunal. (1 Paige, 287.)

† A bill of discovery in aid of a defense to an action cannot be sustained against a person who is not a party to the record at law, although the plaintiff at law is only the agent of such person, and has brought the action on his behalf.

And hence, where an action is brought by the agent of a foreign sovereign on bills of exchange, the acceptors thereof cannot make the sovereign a party to a bill of discovery in aid of their defense to such action. (*The Queen of Portugal v. Glyn*, 7 Cl. & Fin. 466.) And upon the same principle, where an action is brought against underwriters on a policy of insurance, they cannot make a person not a party to the record at law a party to a bill of discovery against the plaintiff at law; though they allege that the policy was effected by the plaintiff at law as agent for such other person. Such a practice might be made an engine for the oppression of persons alleged to be interested, but in reality not interested in the action; and where such persons are also out of the jurisdiction, it might also be made a means of delaying and defeating the plaintiff at law. (*Kerr v. Rew*, 9 Law J. [N. S.] 148, L. C.)

right of the first to require the discovery from the other.<sup>1</sup>

A bill seeking a discovery of deeds or writings sometimes prays relief founded on the deeds or writings of which the discovery is sought. If the relief so prayed be such as might be obtained at law, if the deeds or writings were in the custody of the plaintiff, he must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant;<sup>2</sup> but a bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit.<sup>3</sup>\*

If the title to the possession of the deeds and writings of which the plaintiff prays possession depends on the validity of his title to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or does not depend on the production of the deeds or writings of which he prays the delivery, he must establish his title to the property at law before he can come into a court of equity for delivery of the deeds or writings.<sup>4</sup>

II. Bills not original are either an addition to or a

<sup>1</sup> *Cardale v. Watkins*, 5 Madd. 18; 1 Ves. 344; 3 Atk. 132. But see *Aston* and see *Moodaly v. Moreton*, Dick. 652; *v. Lord Exeter*, 6 Ves. 288.  
S. C. 1 Bro. C. C. 468.

<sup>2</sup> 1 Ves. 344; *Hook v. Dorman*, 1 1 Madd. R. 193; *Crow v. Tyrrell*,  
Sim. & Stu. 227. 3 Madd. 179; *Field v. Beaumont*, 1

<sup>3</sup> *Godfrey v. Turner*, 1 Vern. 247; *Swanst.* 204.  
*Whithurch v. Golding*, 2 P. Wms. 541;

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\* The reason of this distinction is, that in the first mentioned case, where an affidavit is required, the plaintiff seeks to change the tribunal, by substituting the proceedings of a court of equity for the less tedious and less expensive procedure of a court of law.

continuance of an original bill, or both. An imperfection in the frame of a bill may generally be remedied by amendment; but the imperfection may remain undiscovered whilst the proceedings are in such a state that an amendment can be permitted according to the practice of the court. This is particularly the case where, after the court has decided upon the suit as framed, it appears necessary to bring some other matter before the court to obtain the full effect of the decision; or, before a decision has been obtained, but after the parties are at issue upon the points in the original bill, and witnesses have been examined (in which case the practice of the court will not generally permit an amendment of the original bill),<sup>1</sup> some other point appears necessary to be made, or some additional discovery is found requisite.<sup>2</sup> And though a suit is perfect in its institution, it may by some event subsequent to the filing of the original bill become defective, so that no proceeding can be had, either as to the whole, or as to some part, with effect; or it may become abated, so that there can be no proceeding at all, either as to the whole, or as to part of the bill. The first is the case when, although the parties to the suit may remain be-

<sup>1</sup> See c. IV. An amendment for the purpose of adding parties (*Anon.* 2 *Atk.* 15; 3 *Atk.* 111, 371, and *Palk v. Lord Clinton*, 12 *Ves.* 48; *Daws v. Benn*, 1 *Jac. & W.* 513; *Wellbeloved v. Jones*, 1 *Sim. & Stu.* 40); or to correct a mere clerical error (*Att. Gen. v. Newcombe*, 14 *Ves.* 1), will be allowed at the hearing of the cause. In the case of an infant complainant, this liberty, it seems, would be granted without restriction, if for his benefit (*Pritchard v. Quinchant*, *Ambl.* 147); and even in ordinary cases great indulgence has in this respect been shown. See *Filkin v. Hill*, 4 *Bro. P. C.* 640, *Toml. ed.*; *Palk v. Lord Clinton*, 12 *Ves.* 48; *Woollands v. Crowcher*, 12 *Ves.* 174; *Hamilton v. Houghton*, 2

*Bligh*, P. C. 169. And with regard to the practice before the hearing, it may be observed, that after the cause is at issue this court will not give the plaintiff leave to amend, unless he shows not only the materiality of the proposed alteration, but also that he was not in a condition to have made it earlier. See *Longman v. Calliford*, 3 *Anstr.* 807; *Forrest*, *Exch. R.* 13; *Lord Kilcourcy v. Ley*, 4 *Madd.* 212; *Dean of Christchurch v. Simonds*, 2 *Meriv.* 467; *Wright v. Howard*, 6 *Madd.* 106; *M'Neill v. Cahill*, 2 *Bligh P. C.* 228. See *Barnett v. Noble*, 1 *Jac. & W.* 227.

<sup>2</sup> See *Jones v. Jones*, 3 *Atk.* 110; *Goodwin v. Goodwin*, 3 *Atk.* 370.



fore the court, some event subsequent to the institution of the suit has either made such a change in the interests of those parties, or given to some other person such an interest in the matters in litigation that the proceedings, as they stand, cannot have their full effect. The other is the case when, by some subsequent event, there is no person before the court by whom, or against whom, the suit, in the whole or in part, can be prosecuted.

It is not very accurately ascertained in the books of practice, or in the reports, in what cases a suit becomes defective without being absolutely abated, and in what cases it abates as well as becomes defective. But upon the whole it may be collected,<sup>1</sup> that if by any means any interest of a party to the suit in the matter in litigation becomes vested in another, the proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained.<sup>2</sup> And if such a change of interest is occasioned by, or is the consequence of, the death of a party whose interest is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewise abated or discontinued, either in part or in the whole. For as far as the interest of a party dying extends, there is no longer any person before the court by whom or against whom the suit can be prosecuted; and a married woman is incapable by herself of prosecuting a suit. As the interest of a plaintiff generally extends to the whole suit, therefore, in general, upon the death of a plaintiff, or marriage of a female

<sup>1</sup> It is impossible to give authorities for everything asserted upon this head. The books, in words, almost as frequently contradict as support these assertions. But it is conceived, that from an attentive perusal of the cases it will

be found that, in general, the grounds of the decisions warrant the conclusions here drawn.

<sup>2</sup> As an example, see *Mole v. Smith*, 1 Jac. & W. 665.

plaintiff, all proceedings become abated.<sup>1</sup> Upon the death of a defendant, likewise, all proceedings abate as to that defendant. But upon the marriage of a female defendant the proceedings do not abate,<sup>2</sup> though her husband ought to be named in the subsequent proceedings.<sup>3</sup> If the interest of a party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest, which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible upon a contingency, the suit does not so abate as to require any proceeding to warrant the prosecution of the suit against the remaining parties; but if the party dying be the only plaintiff, or only defendant, there may be necessarily an end of the suit, no subject of litigation remaining. If the whole interest of a party dying survives to another party, so that no claim can be made by or against the representatives of the party dying—as, if a bill is filed by or against trustees or executors, and one dies not having possessed any of the property in question, or done any act relating to it which may be questioned in the suit; or by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against

<sup>1</sup> 1 Eq. Cas. Abr. 1, margin; Dick. 8; Adamson v. Hull, 1 Sim. & Stu. 249.

<sup>2</sup> 4 Vin. Abr. 147; Pl. 20; 1 Vern. 318.

<sup>3</sup> 1 Ves. 182. The reason of the difference between the cases of a female plaintiff and defendant seems to be that a plaintiff seeking to obtain a right, the defendant may be injured by answering to one who is not entitled to sue for it; but a defendant merely justifying a possession, the plaintiff cannot be injured by a decree against the person holding that possession. And it has been de-

termined that where a female plaintiff has married, and has, notwithstanding, proceeded in a suit as a *feme sole*, the *mere want* of a bill of revivor is not error for which a decree can be reversed upon a bill of review brought by the defendant. Lady Cramborne v. Dalmahoy, 1 Chan. Rep. 231; Nels. Rep. 86. "And at law, if a woman sues or be sued as sole, and judgment is against her as such, though she was covert, she shall be estopped, and the sheriff shall take advantage of the estoppel." 1 Salk. 310; 1 Rol. Abr. 869, l. 50.

his representatives,<sup>1</sup> the proceedings do not abate. So if a surviving party can sustain the suit, as in the case<sup>2</sup> of several creditors, plaintiffs on behalf of themselves and other creditors.<sup>3</sup> For the persons remaining before the court, in all these cases, either have in them the whole interest in the matter in litigation, or at least are competent to call upon the court for its decree. If, indeed, upon the death of the husband of a female plaintiff suing in her right, the widow does not proceed in the cause, the bill is considered as abated, and she is not liable to the costs.<sup>4</sup> But if she thinks proper to proceed in the cause, she may do so without a bill of revivor; for she alone has the whole interest, and the husband was a party in her right, and therefore the whole advantage of the proceedings survives to her; so that if any judgment has been obtained, even for costs, she will be entitled to the benefit of it.<sup>5</sup> But if she takes any step in the suit after her husband's death, she makes herself liable to the costs from the beginning. If a female plaintiff marries pending a suit, and afterwards, before revivor, her husband dies,<sup>6</sup> a bill of revivor becomes unnecessary, her incapacity to prosecute the suit being removed; but the subsequent proceedings ought to be in the name and with the description which she has acquired by the marriage. A decree on a bill of interpleader may terminate the suit as to the plaintiff, though the litigation may continue between the defendants by interpleader;<sup>7</sup> and in

<sup>1</sup> *Dr. Pary v. Juxon*, 3 Chan. Rep. 40; 2 Freem. 133; *Shelberry v. Briggs*, 2 Vern. 249; *Anon.* 3 Atkyns, 726; see *Humphreys v. Hollis*, 1 Jac. R. 73.

<sup>2</sup> As another example of the proposition in the text, the case of a suit by joint tenants generally may be mentioned. See 11 Ves. 309; 1 Meriv. 364.

<sup>3</sup> 1 Meriv. 364; *Burney v. Morgan*,

1 Sim. & Stu. 358; 1 Sim. & Stu. 494, 495.

<sup>4</sup> *Treat. on Star Cham.* p. 3, sect. 3, Harl. MSS.

<sup>5</sup> *Coppin v. —*, 2 P. Wms. 496.

<sup>6</sup> *Godkin and others against Earl Ferrers*, 1772.

<sup>7</sup> See above, p. 148, note 2.

that case the cause may proceed without revivor,<sup>1</sup> notwithstanding the death of the plaintiff.<sup>2</sup>

There is the same want of accuracy in the books in ascertaining the manner in which the benefit of a suit may be obtained after it has become defective or abated by an event subsequent to its institution, as there is in the distinction between the cases where a suit becomes defective merely, and where it likewise abates. It seems, however, clear, that if any property or right in litigation, vested in a *plaintiff*, is transmitted to another, the person to whom it is transmitted is entitled to supply the defects of the suit, if become defective merely, and to continue it, or at least to have the benefit of it, if abated. It seems also clear that if any property or right, before vested in a *defendant*, becomes transmitted to another, the plaintiff is entitled to render the suit perfect, if become defective, or to continue it, if abated, against the person to whom that property or right is transmitted.

The means of supplying the defects of a suit, continuing it if abated, or obtaining the benefit of it, are: 1, by supplemental bill; 2, by bill of revivor; 3, by bill of revivor and supplement; 4, by original bill in the nature of a bill of revivor; and, 5, by original bill in the nature of a supplemental bill. The distinctions between the cases in which a suit may be added to or

<sup>1</sup> Anon. 1 Vern. 351.

<sup>2</sup> Where on a bill filed by a corporation aggregate, suing in their corporate capacity only, the names of the persons forming the same had been inadvertently and unnecessarily inserted, the members of the corporation having had individually no interest in the subject, the death of a person so improperly named in the bill was not considered as operating to abate the suit. 3 Swanst.

138; and see *Blackburn v. Jepson*, 17 Ves. 473; s. c. 3 Swanst. 132. But where a bill is filed by a corporation sole, having a personal interest, the suit necessarily abates by his death, so far as it affects his personal interest, and to that extent may be revived by his personal representative; and if the suit affect the rights of his successor, such successor may obtain the benefit of it in a different form.

continued, or the benefit of it obtained by these several means, seems to be the following :

1. Where the imperfection of a suit arises from a defect in the original bill,\* or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit,† it may be added to by a supplemental bill merely.‡ Thus, a supplemental bill

<sup>1</sup> As a general rule, it has been laid down that events which have happened subsequently to the filing of the original bill, ought not to be made the subject of amendment, but that they should be brought before the court by a supplemental bill. *Humphreys v. Humphreys*, 3 P. Wms. 349; *Brown v. Higden*, 1 Atk. 291; 3 Atk. 217; *Pilkinton v.*

*Wignell*, 2 Madd. 240; *Usborne v. Baker*, 2 Madd. 379. See a very peculiar case on this subject, in which the plaintiff, upon facts stated in the answer of the defendant, amended his bill in order to meet the defense which arose therefrom. *Knight v. Matthews*, 1 Madd. 566.

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\* A defect in a suit for a specific performance of a purchase contract is not supplied by a supplemental bill in a subsequent suit instituted before a decree in such subsequent suit, by a person claiming to be entitled to the purchase money. (*Cattell v. Corral*, 1 Hare, 216.)

If a person files two bills in succession, in different characters, against the same party, and the statements in the subsequent bill are inconsistent with the statements in the prior bill, they will be both dismissed, although in the subsequent bill the principal inconsistent statement in the prior bill is alleged to be erroneous, and although there is a prayer that such subsequent bill may, if necessary, be considered supplemental to the prior suit. (*Blackburn v. Staniland*, 9 Jur. 1027.)

† Where an original bill is filed for a dissolution of a partnership, on the ground of misconduct, other acts of misconduct occurring subsequently to the filing of the original bill should be made the subject of a supplemental bill. And where new matter which occurred subsequently to the filing of the original bill is introduced by amendment, this objection may be taken by the defendant, even in his answer, if he insists on the same advantage as if he had demurred or pleaded thereto. (*Wray v. Hutchinson*, 2 My. & K. 235.)

When one of the defendants to an original bill dies without having appeared to it, the proper course is to bring his personal representative before the court by a supplemental bill; and if there are no new facts, except the fact of his death, to be brought before the court, and his death does not alter the interest of any of the other defendants, it is not necessary to make them parties to such bill. (*Collins v. Collins*, 6 Jur. 49, V. C. E.)

‡ A supplemental bill cannot be filed to an original bill on which no subpoenas have been served. (*Stewart v. Nichols*, Taml. 307.)

may be filed to obtain a further discovery<sup>1</sup> from a defendant, to put a new matter in issue, or to add parties, where the proceedings are in such a state that the original bill cannot be amended for the purpose.<sup>2</sup> \* And this may be done as well after as before a decree;

<sup>1</sup> *Boeve v. Skipwith*, 2 Ch. Rep. 142; *There is the form of a bill of this nature in 1 Pres. Prac. of Chan. 146.*  
*Usborne v. Baker*, 2 Madd. 379.

<sup>2</sup> *Goodwin v. Goodwin*, 3 Atk. 370.

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\* If a plaintiff, when his cause is in such a state that he cannot amend his bill, discovers new matter which may tend to show that he is entitled to the relief prayed by his bill, he may file a supplemental bill for the purpose of putting the new matter in issue. (*Crompton v. Wombwell*, 4 Sim. 628.)

But a supplemental bill cannot be filed to put in issue matter which, although not discovered till after the original cause was at issue, might have been introduced into the original bill by amendment, by leave of the court. (*Colclough v. Evans*, 4 Sim. 76.)

Where, by inadvertence, a necessary party has not been brought before the court, and the suit is in that stage that the plaintiff cannot amend his bill, he may file a supplemental bill for the purpose of supplying the defect. (*Sample v. Price*, 10 Sim. 238.)

And where liberty is given at the hearing to amend a bill by adding a new party, the plaintiff may bring such new party before the court by a supplemental bill, instead of by amendment. And such supplemental bill may be filed against the new party alone; for as both suits will come on for hearing together, a decree may be made between the defendants to the two suits, although they are not parties on the same record. (*Greenwood v. Atkinson*, 5 Sim. 419.)

And the plaintiff may incorporate in such bill any other matter which might, independently of the order to amend, be the subject of a supplemental bill. (*Wood v. Wood*, 4 Y. & C. Eq. Ex. 135.)

If a supplemental bill is filed by the assignees of a bankrupt, stating that since the filing of the original bill they had obtained the necessary consent to the institution of the suit, which they had not obtained before, such supplemental bill is demurrable; for it is not the office of a supplemental bill to supply the title to file the original bill. (*King v. Tullock*, 2 Sim. 469.)

Where a suit is instituted, on the ground of fraud, to restrain an action commenced on a bill of exchange, and pending the suit the plaintiff in the action recovers payment, the plaintiff in equity may file a supplemental bill praying a repayment of the amount recovered and the costs of the action. (*Pinkus v. Peters*, 5 Beav. 253.)

and the bill may be either in aid of the decree, that it may be carried fully into execution,<sup>1</sup> or that proper directions may be given upon some matter omitted in the original bill,<sup>2</sup> \* or not put in issue by it, or by the defense made to it;<sup>3</sup> or to bring formal parties before the court;<sup>4</sup> or it may be used as a ground to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review, of which it will be necessary to treat more at large in another place. But wherever the same end may be

<sup>1</sup> Woodward v. Woodward, Dick.

33. Or it may be filed for the purpose of appealing against the decree. See Giffard v. Hort, 2 Sch. & Lefr. 386.

<sup>2</sup> 3 Atk. 133.

<sup>3</sup> Jones v. Jones, 3 Atk. 110.

<sup>4</sup> Ibid. 217.

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\* Accordingly, where residuary legatees file a bill against an executor, praying that the usual accounts may be taken, and the executor, by his answer, alleges that there is a balance due to him from the testator's estate in respect of partnership transactions between them; but the decree does not direct the master to investigate the partnership accounts, but only to take the common accounts, the legatees may file a supplemental bill praying for the taking of the partnership accounts, in order that the balance due from the executor may be ascertained, for such a bill is a bill filed to supply a defect in the former bill, and in aid of the decree in the former suit. (Cropper v. Knapman, 2 Y. & C. Eq. Ex. 338.)

But where a creditor of a testator files a bill against the executor, praying that the usual accounts may be taken, and the executor by his answer claims to be a creditor of the testator, by payments made on his account to more than the amount of the assets, and the decree does not direct the master to report, and he does not report as to this claim; and the creditor files a supplemental bill, stating that the payments made by the executor were payments made on account of partnership transactions between the testator and the executor, and therefore were made partly for the executor himself, and praying that the partnership accounts may be taken, so that it may be ascertained what is due from the executor to the testator for the payment of the debt due to the creditor; such supplemental bill, according to the decision in *Grant v. Grant* (5 Law J. Ch. Rep. [O. S.], 145), is demurrable, as an attempt to begin a new suit after having failed in a former suit for the same matter. This decision seems directly opposed to that in *Cropper v. Knapman*, for there does not appear to be any substantial distinction between the two cases. The editor conceives that the decision in *Grant v. Grant* is wrong.

obtained by amendment, the court will not permit a supplemental bill to be filed.<sup>1</sup>\*

When any event happens subsequent to the time of filing an original bill,<sup>2</sup> which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to a party, as the happening of some other contingency, the defect may be supplied by a bill which is usually called a supplemental bill,<sup>3</sup> and is in fact merely so with respect to the rest of the suit, though with respect to its immediate object, and against any new party, it has in some degree the effect of an original bill. If any event happens which occasions any alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff suing in his own right of his whole interest in the subject, as in the case of a mortgage or other partial change of interest; or if a plaintiff suing in his own right is entirely deprived of his interest, but he is not the sole plaintiff, the defect arising from this event may be supplied by a bill of the same kind, which is likewise commonly termed, and is, in some respects, a supplemental bill merely, though in other respects, and especially against any new party, it has also in some degree the effect of an original bill. In all these cases the parties to the suit are able to

<sup>1</sup> See *Baldwin v. Mackown*, 3 Atk. 817; see p. 159, note 1.

<sup>2</sup> 1 Atk. 291; 3 Atk. 217; see above, p. 159, note 1.

<sup>3</sup> It may here be remarked, that such subsequent event must not only be relevant, but material (see *Milner v.*

*Lord Harewood*, 17 Ves. 144), and of such a nature, that the relief sought in respect thereof cannot be obtained under the original bill. *Adams v. Dowding*, 2 Madd. 53; *Mole v. Smith*, 1 Jac. & W. 665.

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\* See *Parker v. Constable*, 15 Law J. C. R. (N. S.) 16, and *Blackburn v. Staniland*, 9 Jur. 1027. And see *Colclough v. Evans*, 4 Sim. 76; *Greenwood v. Atkinson*, 5 Sim. 419; *Wood v. Wood*, 4 Y. & C. Eq. Ex. 135, *supra*, p. 160, note \*.



proceed in it to a certain extent, though from the defect arising from the event subsequent to the filing of the original bill the proceedings are not sufficient to attain their full object.

If the interest of a *plaintiff suing in auter droit* entirely determines by death or otherwise, and some other person thereupon becomes entitled to the same property under the same title, as in the case of new assignees under a commission of bankrupt, upon the death or removal of former assignees,<sup>1</sup> or in the case of an executor or administrator, upon the determination of an administration *durante minori ætate*,<sup>2</sup> or *pendente lite*, the suit may be likewise added to and continued by supplemental bill.<sup>3</sup> For in these cases there is no change of interest which can affect the questions between the parties, but only a change of the person in whose name the suit must be prosecuted; and if there has been no decree, the suit may proceed, after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff. But if a decree has been obtained before the event on which such a supplemental bill becomes necessary, though the decree be only a decree *nisi*, there must be a decree on the supplemental bill, declaring that the plaintiff in that bill is entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it,

<sup>1</sup> Anon. 1 Atk. 88; s. c. 1 Atk. 571; Brown v. Martin, 3 Atk. 218.

<sup>2</sup> See Jones v. Basset, Prec. in Ch. 174; Cary's Rep. 22; Stubbs v. Leigh, 1 Cox R. 133.

<sup>3</sup> In the case of an administration

determined by death, a bill of *revivor* by a subsequent administrator has been admitted. Owen v. Curzon, 2 Vern. 237; Huggins v. York Build. Comp. 2 Eq. Cas. Abr. 3.

and to prosecute the decree and take the steps necessary to render it effectual.<sup>1</sup>

If a sole plaintiff suing in his own right is deprived of his whole interest in the matters in question by an event subsequent to the institution of a suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees, or in case such a plaintiff assigns his whole interest to another, the plaintiff being no longer able to prosecute for want of interest,<sup>2</sup> and his assignees claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by a supplemental bill, but must be sought by an original bill<sup>3</sup> in the nature of a supplemental bill, which will be the subject of discussion in a subsequent page.

If a commission of bankrupt issues against any party to a suit, or he is discharged as an insolvent debtor, his interest in the subject is, unless he is a mere trustee, generally transferred to his assignees;<sup>4</sup> and to bring them before the court a supplemental bill is necessary, to which the bankrupt or insolvent debtor is not usually required to be a party, although a bankrupt may dispute the validity of the commission issued against him.<sup>5</sup> But, if plaintiff, a bankrupt

<sup>1</sup> Brown v. Martin, 3 Atk. 218.

<sup>2</sup> Upon the question whether the bankruptcy of a sole plaintiff is, or ought to be considered an abatement of a suit, some difference of opinion has prevailed. See Sellas v. Dawson, rep. 1 Atk. Sand. ed. 263; note, 4 Madd. 171, and the cases of Randall v. Mumford, 18 Ves. 424, and Porter v. Cox, 5 Madd. 80, in which revivor seems to have been thought necessary. But as it cannot be stated *a priori*, that there will not be any surplus of the bankrupt's estate after satisfaction of the creditors who may prove under the commission, it seems impossible to insist, even where a plaintiff suing in his

own right becomes a bankrupt, that, as a general rule, the suit abates. And the truth of the proposition will be more apparent from what is further stated in the next page of the text.

<sup>3</sup> See Harrison v. Ridley, Com. Rep. 589.

<sup>4</sup> 9 Ves. 86; 1 Ves. & B. 547; and see, as to the exceptions, Copeman v. Gallant, 1 P. Wms. 314; 2 P. Wms. 318; *Ex parte* Ellis, 1 Atk. 101; 1 Atk. 159, 234; 6 Ves. 496; Joy v. Campbell, 1 Sch. & Lefr. 328; *Ex parte* Martin, 19 Ves. 491; s. c. 2 Rose B. C. 331; *Ex parte* Gillett, 3 Madd. 28.

<sup>5</sup> The commission, however, cannot be actually impeached by him in the

may proceed himself in the suit, if he disputes the validity of the commission, or a bankrupt or insolvent may proceed if the suit is necessary for his protection,<sup>1</sup> or if his assignees do not think fit to prosecute the suit, and he conceives that it is for his advantage to prosecute it.<sup>2</sup> Under those circumstances, however, he must bring the assignees before the court by supplemental bill, as any benefit which may be derived from the suit must be subject to the demands of the assignees,<sup>3</sup> unless he seeks his personal protection only against a demand which cannot be proved, or which the person making the demand may not think fit to prove, under the commission issued against the bankrupt, or from which the insolvent debtor may not be discharged.<sup>4</sup>

And if by any event the whole interest of a *defendant* is entirely determined, and the same interest is become vested in another by a title not derived from the former party, as in the case of succession to

suit; his proper mode of disputing its validity is by an action at law, or by a petition to supersede the same. See *Hammond v. Attwood*, 3 Madd. 158; and see *Bryant v. Withers*, 2 Maule & Selw. 123; 15 Ves. 468; *Ex parte M'Gennis*, 18 Ves. 289; s. c. 1 Rose B. C. 60; *Ex parte Bryant*, 2 Rose B. C. 1; *Ex parte Northam*, 2 Ves. & Bea. 124; s. c. 2 Rose B. C. 140; *Ex parte Price*, 3 Madd. 228; *Ex parte Ranken*, 3 Madd. 371; *Ex parte Bass*, 4 Madd. 270; *Bayley v. Vincent*, 5 Madd. 48; *Ex parte Gale*, 1 Glyn & J. 43.

<sup>1</sup> *Anon.* 1 Atk. 263; 1 Madd. R. 425. And this seems to be another reason why it cannot be a general rule that the bankruptcy of the plaintiff causes an abatement, even where he sues in his own right.

<sup>2</sup> *Lowndes v. Taylor*, 1 Madd. R. 423; s. c. 2 Rose B. C. 365, 432. If an uncertificated bankrupt should be desirous that a suit in respect of the property should be commenced or pros-

ecuted, and his assignees should refuse to adopt that course, it seems, that to attain his object, he must petition for leave to use their names for the purpose of the proceeding, he indemnifying them. 5 Ves. 587, 590; *Benfield v. Solomons*, 9 Ves. 77; 3 Madd. 158.

<sup>3</sup> Although, it seems, the bankruptcy of a plaintiff, suing even in his own right, does not, at least as a general rule, abate the suit, it unquestionably renders it defective (18 Ves. 427); and this court, upon a special application, will dismiss the bill (but, as it seems, without costs), unless the plaintiff make his assignees, or upon notice they make themselves parties thereto by supplemental bill within a limited time. *Williams v. Kinder*, 4 Ves. 387; *Randall v. Mumford*, 18 Ves. 424; *Wheeler v. Malins*, 4 Madd. 171; *Porter v. Cox* 5 Madd. 80; s. c. 1 Buck B. C. 469; *Sharp v. Hullett*, 2 Sim. & Stu. 496.

<sup>4</sup> See *supra*, note 2.

a bishopric or benefice, or of the determination of an estate tail, and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event described must also be obtained by original bill in the nature of a supplemental bill ; though if the defendant whose interest has thus determined is not the sole defendant, the new bill is supplemental as to the rest of the suit, and is so termed and considered. But if the interest of a *defendant* is not determined, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, or by bankruptcy or insolvency, the defect in the suit may be supplied by supplemental bill, whether the suit is become defective merely, or abated as well as become defective.<sup>1</sup> \* For in these cases the new party comes before the court exactly in the same plight and condition as the former party, is bound by his acts, and *may* be subject to all the costs of the proceedings from the beginning of the suit.<sup>2</sup>

In all these cases, if the suit has become abated as well as defective, the bill is commonly termed a supplemental bill in the nature of a bill of revivor, as it has the effect of a bill of revivor in continuing the suit.

<sup>1</sup> See *Rutherford v. Miller*, 2 Anstr. 458 ; *Russell v. Sharp*, 1 Ves. & B. 500 ; *Whitcombe v. Minchin*, 5 Madd. 91 ; *Foster v. Deacon*, 6 Madd. 59 ; *Turner v. Robinson*, 1 Sim. & Stu. 3. In the cases of *Monteith v. Taylor*, 9 Ves. 615, and *Rhode v. Spear*, 4 Madd. 51, a motion on the part of the defendant, after his bankruptcy, that the bill might be

dismissed, was allowed to be proper under the circumstances ; which affords a ground, besides the reasons already intimated in relation to the plaintiff becoming bankrupt, so far as they apply, for presuming that the bankruptcy of the defendant does not abate the suit, but merely renders it defective.

<sup>2</sup> 1 Atk. 89.

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\* An assignee of an insolvent defendant should not bring himself before the court by supplemental bill, until he has applied to the plaintiff to file a supplemental bill for the purpose of bringing him (the assignee) before the court, and the plaintiff has declined or neglected to do so. (*Phillips v. Clark*, 7 Sim. 231.)

2. Whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir at law, executor or administrator, so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued in this case likewise by bill of revivor merely.

When a suit became abated after a decree signed and enrolled,<sup>1</sup> it was anciently the practice to revive the decree by a subpoena in the nature of a *scire facias*,<sup>2</sup> upon the return of which the party to whom it was directed might show cause against the reviving of the decree,<sup>3</sup> by insisting that he was not bound by the decree,<sup>4</sup> or that for some other reason it ought not to be enforced against him, or that the person suing the subpoena was not entitled to the benefit of the decree. If the opinion of the court was in his favor he was dismissed with costs. If it was against him,<sup>5</sup> or if he did not oppose the reviving of the decree, interrogatories were exhibited for his examination touching any matter necessary to the proceedings.<sup>6</sup> If he opposed the reviving of the decree on the ground of facts which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter

<sup>1</sup> 1 Ves. 182, 184.

<sup>2</sup> 11 Ves. 311.

<sup>3</sup> See 1 Vern. 426; *Sayer v. Sayer*,  
Dick. 42.

<sup>4</sup> *Brown v. Vermuden*, 1 Cas. in  
Chan. 272.

<sup>5</sup> 1 Cas. in Chan. 273.

<sup>6</sup> *Anon.* 2 Freem. 128.

was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree, this process was ineffectual,<sup>1</sup> as it revived the decree only, and the subsequent proceedings could not be revived but by bill; and the enrollment of decrees being now much disused, it is become the practice to revive in all cases, indiscriminately, by bill.<sup>2</sup>

3. If a suit becomes abated, and by any act beside the event by which the abatement happens the rights of the parties are affected, as by a settlement,<sup>3</sup> or a devise<sup>4</sup> under certain circumstances, though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it, yet to bring before the court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to and made part of the bill of revivor, show the settlement, or devise, or other act by which their rights are affected. And, in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor.<sup>5</sup>\*

<sup>1</sup> Croster v. Wister, 2 Cha. Rep. 67; Thorn v. Pitt, Sel. Cas. in Chan. 54; s. c. 2 Eq. Cas. Abr. 180.

<sup>2</sup> See Dunn v. Allen, 1 Vern. 426; Pract. Reg. 90, Wy. ed.

<sup>3</sup> See Merrywether v. Mellish, 13 Ves. 161.

<sup>4</sup> See Rylands v. Latouche, 2 Bligh P. C. 566.

<sup>5</sup> See Russell v. Sharp, 1 Ves. & Bea. 500.

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\* "If a person interested under a will files a bill for an account against the executors, not seeking to charge them for willful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of were known to the deceased plaintiff." (Garrett v. Noble, 6 Sim. 504.)

4. If the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the Court of Chancery, as in the case of a devise of a real estate,<sup>1</sup> the suit is not permitted to be continued by a bill of revivor. An original bill, upon which the title may be litigated,<sup>2</sup> must be filed; and this bill will have so far the effect of a bill of revivor, that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor.<sup>3</sup>

5. If the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming entitled upon the death of a prior tenant under the same settlement,<sup>4</sup> the suit cannot be continued by bill of revivor, nor can its defects be supplied by a supplemental bill. For though the successor in the first case, and the remainder-man in the second, have the same property which the predecessor, or prior tenant, enjoyed, yet they are not in many cases bound by his acts, nor have they in some cases precisely the same rights. But, in general, by an original bill in the nature of a supplemental bill \* the benefit of the former

<sup>1</sup> Backhouse v. Middleton, 1 Cas. in Chan. 173; s. c. 3 Ch. Rep. 39, and 2 Freem. 132; Mosely, 44.

<sup>2</sup> 1 Eq. Cas. Abr. 2, pl. 2 and 7; Huet v. Lord Say and Sele, Sel. Cas. in Chan. 53.

<sup>3</sup> Clare v. Wordell, 2 Vern. 548; 1

Eq. Cas. Abr. 83; Minshull v. Lord Mohun, 2 Vern. 672; 6 Bro. P. C. 36, Toml. ed.

<sup>4</sup> 2 Eq. Cas. Abr. 3, in margin; Osborne v. Usher, 6 Bro. P. C. 20, Toml. ed.; 1 Bro. P. C. 205; Lloyd v. Johnes, 9 Ves. 37.

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\* See Woods v. Woods, note \* to p. 196.

proceedings may be obtained.<sup>1</sup> If the party whose interest is thus determined was not the sole plaintiff or defendant, or if the property which occasions a bill of this nature affects only a part of the suit, the bill, as to the other parties and the rest of the suit, is, as has been before observed, supplemental merely. There seems to be this difference between an original bill in the nature of a bill of revivor, and an original bill in the nature of a supplemental bill. Upon the first the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause;<sup>2</sup> and if any decree has been made in the first cause, the same decree shall be made in the second.<sup>3</sup> But in the other case a new defense may be made; the pleadings and depositions<sup>4</sup> cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree.<sup>5</sup>

The voluntary alienation of property pending a suit, by any party to it, is not permitted to affect the rights of the other parties if the suit proceeds without disclosure of the fact, except as the alienation may disable the party from performing the decree of the court.<sup>6</sup> Thus, if pending a suit by a mortgagee to foreclose the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of

<sup>1</sup> 9 Ves. 54, 55.

<sup>2</sup> See *Houlditch v. Marquis of Don-*  
*egall*, 1 Sim. & Stu. 491.

<sup>3</sup> *Clare v. Wordell*, 2 Vern. 548;  
*Minshull v. Lord Mohun*, 2 Vern. 672;  
1 Eq. Cas. Abr. 83; 1 Atk. 89.

<sup>4</sup> *Earl of Peterborough v. Duchess*  
*of Norfolk*, Prec. in Chan. 212; see

also *Coke v. Fountain*, 1 Vern. 413, and  
*City of London v. Perkins*, 3 Bro. P. C.  
602, Toml. ed. as to reading in one  
causé depositions taken in another.

<sup>5</sup> See *Lloyd v. Johnes*, 9 Ves. jr. 37.

<sup>6</sup> 2 Ves. & Bea. 205, 206; 4 Dow. P.  
C. 435.



redemption, an absolute decree of foreclosure against the mortgagor will bind the second mortgagee, or assignee of the equity of redemption, who can only have the benefit of a title so gained by filing a bill for that purpose.<sup>1</sup> But upon a bill by a mortgagor to redeem, if the mortgagee assigns *pendente lite*, the assignee must be brought before the court by the mortgagor, who cannot otherwise have a reconveyance of the mortgaged property.<sup>2</sup> The bill necessary in the last case is merely supplementary; but in the former, the bill must be an original bill in the nature of a cross-bill, to redeem the mortgaged property. If the party aliening be plaintiff in the suit, and the alienation does not extend to his whole interest, he may also bring the alienee before the court by a bill, which, though in the nature of an original bill against the alienee, will be supplemental against the parties to the original suit, and they will be necessary parties to the supplemental suit only so far as their interests may be affected by the alienation.<sup>3</sup> Generally, in cases of alienation *pendente lite*, the alienee is bound by the proceedings in the suit after the alienation, and before the alienee becomes a party to it;<sup>4</sup> and depositions of witnesses taken after the alienation, before the alienee became a party to the suit, may be used by the other parties against the alienee as they might have been used against the party under whom he claims.<sup>5</sup>

<sup>1</sup> 2 Atk. 175; 11 Ves. 199.

<sup>2</sup> 11 Ves. 199; and see *Wetherell v. Collins*, 3 Madd. 255.

<sup>3</sup> There is an instance in which the court, in a case of this kind, allowed an alienee of a plaintiff to participate in certain interlocutory proceedings without previously requiring a supplemental bill to be filed for the purpose of mak-

ing him a party to the suit. *Toosey v. Burchell*, 1 Jac. R. 159.

<sup>4</sup> It may be observed, however, that the alienee may by supplemental bill, in the nature of an original bill, make himself a party to the suit.\* *Foster v. Deacon*, 6 Madd. 59; and see *Binks v. Binks*, reported 2 Bligh P. C. 593, note.

<sup>5</sup> See *Garth v. Ward*, 2 Atk. 174.

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\* See note \* to p. 166.

Having considered generally the distinctions between the several kinds of bills by which a suit becomes defective or abated, may be added to or continued, or by which the benefit of the suit may be obtained, it remains in this place to consider more particularly the frame of the first three of those kinds. The other two will form part of the subject to be considered under the next head.

1. A supplemental bill must state the original bill, and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray that all the defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter.<sup>1</sup> If indeed the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only;<sup>2</sup> unless, which is frequently the case, the interests of the other defendants may be affected by that decree. Where a supplemental bill is merely for the purpose of bringing formal parties before the court as defendants, the parties defendants to the original bill

<sup>1</sup> 2 Madd. 60.

<sup>2</sup> See *Brown v. Martin*, 3 Atk. 217.

need not in general be made parties to the supplemental.<sup>1</sup> \*

2. A bill of revivor must state the original bill,† and the several proceedings thereon, and the abatement; it must show a title to revive,<sup>2</sup> and charge

<sup>1</sup> See *Brown v. Martin*, 3 Atk. 217.

<sup>2</sup> Com. Rep. 590.

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\* Where a bill is filed by one of two next of kin against the executors of a testator, and in consequence of an objection taken by the answer of the executors for want of parties, a supplemental bill is afterwards filed to bring another next of kin before the court, the executors must be parties to the supplemental bill, in order that they may have an opportunity of stating upon the pleadings any case they may have as against such other next of kin. (*Jones v. Howells* and *Jones v. Godsall*, 2 Hare, 342.)

Where one of several coplaintiffs in an original suit mortgages his interest and becomes insolvent, defendants in such original suit who are trustees for the plaintiff are necessary parties to a supplemental bill filed by the other coplaintiffs against the mortgagee and provisional assignee; for otherwise the accounting parties, the trustees, might not know till the hearing to whom they were to account. (*Feary v. Stephenson*, 1 Beav. 42.)

In order to determine a question as to parties to a supplemental bill depending on facts alleged in the original bill, the court is bound to look at the allegations in the original bill. (*Pinkus v. Peters*, 5 Beav. 253.)

On this subject see also *Greenwood v. Atkinson*, note \* to p. 160, *supra*, and *Collins v. Collins*, note † to p. 159, *supra*.

† The 49th order of Aug. 1841, declares that "it shall not be necessary in any bill of revivor to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it."

Prior to this order, it was necessary that a bill of revivor against new parties should set forth so much of the original bill as shows the plaintiff's title to revive, otherwise it was demurrable. (*Phelps v. Sprowle*, 4 Sim. 318.)

And even now it is necessary for a plaintiff in a bill of revivor to state enough to show his title to revive the original suit against the defendant to the bill of revivor, and the precise character in which the defendant is brought before the court. For the statements of the bill of revivor cannot be explained by importing into it the statements of the original bill; for if that were allowed, the defendant to the bill of revivor could not safely demur until he had taken a copy of the original bill. (*Griffiths v. Rickitts*, 3 Hare, 484.)

that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor \* as it was in respect to the parties to the original bill at the time the abatement happened ; and it must pray that the suit may be revived accordingly. It may be likewise necessary to pray that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets by the representative of a deceased party.<sup>1</sup> In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely ; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party to answer the demands made against it by the suit ; and the prayer of the bill, therefore, in such case usually is, not only that the suit may be revived, but also, that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken, and so far the bill is in the nature of an original bill. If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill,

<sup>1</sup> Prac. Reg. 90, Wy. ed.

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\* If a defendant dies having appointed two executors, and only one of them proves, it is sufficient for the plaintiff to revive the suit against that executor. (*Strickland v. Strickland*, 12 Sim. 463.)

When a suit has abated by the death of a coplaintiff, whose right devolves to his representatives, it can only be revived by a bill, to which these representatives, the other plaintiffs, and all the defendants to the original bill are parties. (*Cave v. Cork*, 12 Law J. [N. S.] 156, V. C. B.)

or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered.

Upon a bill of revivor the defendants must answer in eight days after appearance, and submit that the suit shall be revived, or show cause to the contrary; and in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer, by an order made upon motion as a matter of course.<sup>1</sup> The ground for this is an allegation that the time allowed the defendant to answer by the course of the court is expired, and that no answer is put in; it is therefore presumed that the defendant can show no cause against reviving the suit in the manner prayed by the bill.<sup>2</sup>

An order to revive may also be obtained in like manner if the defendant puts in an answer submitting to the revivor, or even without that submission, if he shows no cause against the revivor. Though the suit is revived of course in default of the defendant's answer within eight days, he must yet put in an answer if the bill requires it; as, if the bill seeks an admission of assets, or calls for an answer to the original bill, the end of the order of revivor being only to put the suit and proceedings in the situation in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. And notwithstanding an order for revivor has been thus obtained, yet if the defendant conceives that the plaintiff is not entitled to revive the

<sup>1</sup> See *Harris v. Pollard*, 3 P. Wms. 348.

<sup>2</sup> The court, after abatement of a suit, has acted without revivor in some instances, where the rights of the parties have been fully ascertained by decree or by subsequent proceedings; but

in general revivor is necessary to warrant any proceeding after abatement (1 Ves. 186; *Roundell v. Curren*, 6 Ves. 250), except proceedings to compel revivor, or to prevent injury to the surviving parties, if the persons entitled to revive neglect to do so.

suit against him, he may take those steps which are necessary to prevent the further proceeding on the bill, and which will be noticed in treating of the different modes of defense to bills of revivor; and though these steps should not be taken, yet, if the plaintiff does not show a title to revive, he cannot finally have the benefit of the suit when the determination of the court is called for on the subject.<sup>1</sup>

If a decree be obtained against an executor for payment of a debt of his testator, and costs, out of the assets, and the executor dies, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, and the assets of the testator may be pursued in his hands, without reviving against the representative of the original defendant.<sup>2</sup>

After a cause is revived, if the person reviving finds the original bill to require amendment, and the pleadings are in such a state that the amendment of the bill would be permitted if the deceased party were living, the bill may be amended notwithstanding the death of that party, and matters may be inserted which existed before the original bill was filed, and stated as if the deceased party had been living.<sup>3</sup>

After a decree a defendant may file a bill of revivor, if the plaintiffs, or those standing in their right, neglect to do it.<sup>4</sup> \* For then the rights of the parties are ascer-

<sup>1</sup> 3 P. Wms. 348.

<sup>2</sup> 3 Atk. 773. And see *Johnson v. Peck*, 2 Ves. 465.

<sup>3</sup> *Kelips v. Paine*, 15 March, 1745; *Philips v. Derby*, Dick. 98.

<sup>4</sup> The general proposition, that a defendant or his representatives, if he or they have an interest in the further prosecution of the suit, may revive, if the plaintiffs, or those standing in their

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\* Where a suit has become abated after a decree for an account, and the plaintiff neglects to revive the suit, a defendant who is interested in the account may file a bill to revive it and prosecute the decree, although he could not have filed the original bill. (*Devaynes v. Morris*, 1 M. & C. 213.)

tained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and equally have a right to prosecute it.<sup>1</sup> The bill of revivor in this case, therefore, merely substantiates the suit, and brings before the court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings,<sup>2</sup> except so far as they remain undecided. In the case of a bill by creditors on behalf of themselves and other creditors, any creditor is entitled to revive.<sup>3</sup> A suit become entirely abated may be revived as to part only of the matter in litigation, or as to part by one bill, and as to the other part by another. Thus, if the rights of a plaintiff in a suit upon his death become vested, part in his real, and part in his personal representatives, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends.<sup>4</sup>

3. A bill of revivor and supplement is merely a compound of those two species of bills, and in its separate parts must be framed and proceeded upon in the same manner.\*

right, neglect so to do, seems to be now fully established. See *Kent v. Kent*, Prec. in Chan. 197; 1 Eq. Cas. Abr. 2; 2 Vern. 219, 297; *Williams v. Cooke*, 12 Ves. 406; *Horwood v. Schmedes*, 12 Ves. 311. And see *Gordon v. Bertram*, 1 Meriv. 154; *Adamson v. Hall*, 1 Turn. R. 258; *Bolton v. Bolton*, 2 Sim. & Stu. 371.

<sup>1</sup> See, however, *Anon.* 3 Atk. 691, and *Lord Stowell v. Cole*, 2 Vern. 296.

<sup>2</sup> See *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2.

<sup>3</sup> That is, of course, after he hath proved his debt. See *Pitt and the Creditors of the Duke of Richmond*, 1 Eq. Cas. Abr. 3. And see *Dixon v. Wyatt*, 4 Madd. 392; 1 Sim. & Stu. 494. And, in such a suit, the personal representative of one of the plaintiffs deceased may revive. *Burney v. Morgan*, 1 Sim. & Stu. 358.

<sup>4</sup> *Ferrers v. Cherry*, 1 Eq. Cas. Abr. 3, 4.

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\* Where a suit abates after a general demurrer for want of equity has been filed, but before it has been heard, the plaintiff, or a person claiming in the same right, is at liberty to file a bill of revivor and supplement, alleg-

III. Bills in the nature of original bills, though occasioned by former bills, are of eight kinds: 1. Cross-bills. 2. Bills of review, to examine and reverse decrees signed and enrolled. 3. Bills in the nature of bills of review, to examine and reverse decrees either signed and enrolled, or not, brought by persons not bound by the decrees. 4. Bills impeaching decrees upon the ground of fraud. 5. Bills to suspend the operation of decrees on special circumstances, or to avoid them on the ground of matter subsequent. 6. Bills to carry decrees into execution. 7. Bills in the nature of bills of revivor. And, 8. Bills in the nature of supplemental bills.

1. A cross-bill is a bill brought by a defendant against a plaintiff,<sup>1</sup> or other parties in a former bill depending, touching the matter in question in that bill.<sup>2</sup> † A bill of this kind is usually brought to obtain

<sup>1</sup> It has been decided that a cross-bill may be filed in chancery to an original bill in the Exchequer.\* *Glegg v. Legh*, 4 Madd. 193; *Parker v. Leigh*, 6 Madd. 115.

<sup>2</sup> For an example of the sense in which this proposition is to be understood, see *Hilton v. Barrow*, 1 Ves. jr. 284, and see *Piggott v. Williams*, 6 Madd. 95.

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ing such supplemental matter as may be necessary to show by and against whom an order to revive may properly be obtained; but he is not at liberty to claim the same or additional relief by adding supplemental matter in corroboration of the original claim, and not required for the purpose of showing by and against whom an order to revive may properly be obtained. (*Bampton v. Birchall*, 5 Beav. 330.)

\* See note † to p. 103, *supra*.

† To a suit instituted to obtain the benefit of an executed contract, a defense founded on a mistake as to the quantity of the interest intended to pass, or on inadequacy of consideration, or on the substitution of another contract, cannot be made by answer, but must be made by a cross-bill. (*Richards v. Bayly*, 1 Jones & Latouche, 120; *Nash v. Flynn*, Id. 162.)

To a bill for a specific performance of a partnership, a defendant cannot make the misconduct of another partner available as a defense except by means of a cross-bill. (*England v. Curling*, 8 Beav. 129.)

Where a suit is instituted by the lessees of an ecclesiastical corporation for an account and payment of the value of tithes, to which suit the cor-



either a necessary discovery, or full relief to all parties. It frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill or cross-bills to bring every matter in dispute completely before the court, litigated by the proper parties, and upon proper proofs. In this case it becomes necessary for some or one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court.<sup>1</sup> A cross-bill should state the original bill, and proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of cross-litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. But a cross-bill being generally considered as a defense,<sup>2</sup> or as a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show

<sup>1</sup> There is an instance, however, in which this court will, it seems, contrary to the old practice, give the benefit of a cross-bill to a defendant upon his answer, namely, where the original bill is for specific performance, and he proves an agreement different from that insisted

on by the plaintiff, and submits to perform the same, for, in such a case, if the court decide in favor of that stated by the defendant, it will decree the same to be executed. *Fife v. Clayton*, 13 Ves. 546; 15 Ves. 525.

<sup>2</sup> 3 Atk. 812.

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poration are not parties, the occupiers, who are the defendants thereto, cannot file a cross-bill against the corporation, as well as against the lessees, for a discovery and production of documents. For such a suit is regarded as a mere possessory suit, and not as establishing the right to tithe, and therefore the corporation has no interest in the suit. And it would be extremely mischievous if a tenant in fee, whenever a dispute arises between his lessee and others, were to be compelled to produce his title deeds at the request of those other persons, and for the purpose of destroying his own title. (*Tooth v. Dean and Chapter of Canterbury*, 3 Sim. 49.)

any ground of equity to support the jurisdiction of the court.<sup>1</sup>

A cross-bill may be filed to answer the purpose of a plea *puis darrein continuance* at the common law. Thus, where, pending a suit, and after replication and issue joined, the defendant, having obtained a release, attempted to prove it *viva voce* at the hearing, it was determined that the release not being in issue in the cause, the court could not try the fact, or direct a trial at law for that purpose; and that a new bill must be filed to put the release in issue. In the case before the court, indeed, the bill directed to be filed seems to have been intended to impeach the release on the ground of fraud or surprise, and therefore to have been a proceeding on the part of the plaintiff in the original bill. But it was clearly determined that without being put in issue in the cause by a new bill, it could not be used in proof.<sup>2</sup>

Upon hearing a cause, it sometimes appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens where persons in opposite interests are codefendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross-bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties

<sup>1</sup> Doble v. Potman, Hardr. 160. And see Sir John Warden's case, mentioned by Blackstone, in 1 Bl. Rep. 132.

<sup>2</sup> Hayne v. Hayne, 3 Ch. Rep. 19; 3 Swanst. 492, 474. See as to filing a supplemental bill, where a matter has not been properly put in issue, Jones v. Jones, 3 Atk. 110; 1 Jac. & W. 339.

fully and properly for its decision ; and will reserve the directions or declarations which it may be necessary to give or make touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing.<sup>1</sup>

2. The object of a bill of review is to procure an examination and reversal of a decree<sup>2</sup> made upon a former bill, and signed by the person holding the great seal, and enrolled.<sup>3</sup> It may be brought upon error of law appearing<sup>4</sup> in the body of the decree itself,<sup>5</sup> or upon discovery of new matter.<sup>6</sup>\* In the first case the decree can only be reversed upon the ground of the apparent error;<sup>7</sup> as if an absolute decree be made against a person, who upon the face of it appears to have been at the time an infant.<sup>8</sup> A bill of this nature may be brought without the leave of the

<sup>1</sup> If a creditor who hath come in under a decree against his debtor require relief, for the purpose of assisting the investigation before the master, which cannot be obtained by a rehearing of the original cause, he may, without direction of the court, seek it by a cross-bill. *Latouche v. Lord Dunsany*, 1 Sch. & Lefr. 137.

<sup>2</sup> There can be no bill of review upon a decree of the court on exceptions to a decree of commissioners of charitable uses, under the statute. See *Windsor v. Inhabitants of Farnham*, Cro. Car. 40; *Saul v. Wilson*, 2 Vern. 118. Nor, upon a decree of this court confirming a judgment of the lord mayor, respecting tithes in London, under the statute 37 Hen. VIII, c. 12; *Pridgeon's Case*, Cro. Car. 351.

<sup>3</sup> *Tothill*, 47; *Boh. Curs. Canc.* 353; *Taylor v. Sharp*, 3 P. Wms. 371.

<sup>4</sup> 1 Roll. Ab. 382; *Venables v. Foyle*, 1 Cas. in Chan. 4; *Tothill*, 41.

<sup>5</sup> *Grice v. Goodwin*, Prec. in Chan. 260; 3 P. Wms. 371.

<sup>6</sup> *Le Neve v. Norris*, 2 Bro. P. C. 73, Toml. ed.; and see 17 Ves. 178. This term includes new evidence of facts put in issue, which would materially affect the judgment of the court (16 Ves. 350). See *Ord v. Noel* (6 Madd. 127), which, although a case relating to a supplemental bill in the nature of a bill of review, seems to show that the matter must be material, and such at the least as will raise a fit subject for judgment in the cause.

<sup>7</sup> *Lady Cramborne v. Dalmahoy*, 1 Ch. Rep. 231; *Nels. Rep.* 86; *Prac. Reg.* 94, Wy. ed.; 4 Vin. Abr. 414.

<sup>8</sup> *Prac. Reg.* 225, Wy. ed.; 17 Ves.

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\* "The mere propriety of a former decree cannot be questioned by bill of review; it is only where there is error on the face of it that such a bill can be sustained." (*Haig v. Homan*, 8 Cl. & F. 321.)

court previously given.<sup>1</sup>\* But if it sought to reverse a decree signed and enrolled, upon discovery of some new matter,<sup>2</sup> the leave of the court must be first obtained;<sup>3</sup> and this will not be granted but upon allegation upon oath that the new matter<sup>4</sup> could not be produced or used<sup>5</sup> by the party claiming the benefit of it at the time when the decree was made.<sup>6</sup> If the court is satisfied that the new matter is relevant and material, and such as might probably have occasioned a different determination,<sup>7</sup> it will permit a bill of review to be filed.<sup>8</sup>

Error in matter of form only, though apparent on the face of a decree, seems not to have been considered as sufficient ground for reversing the decree;<sup>9</sup> and matter of abatement has also been treated as not capable of being shown for error to reverse a decree.<sup>10</sup>

It has been questioned whether the discovery of new matter not in issue in the cause in which a decree has been made, could be the ground of a bill of review;<sup>11</sup> and whether the new matter on which bills of

<sup>1</sup> 2 Atk. 534; *Houghton v. West*, 2 Bro. P. C. 88, Toml. ed.

<sup>2</sup> 2 Ves. 576; 3 P. Wms. 372; Nels. Rep. 52.

<sup>3</sup> *Tothill*, 42; 2 Atk. 534; 17 Ves. 177.

<sup>4</sup> See *O'Brien v. O'Connor*, 2 Ball & B. 146.

<sup>5</sup> See 1 Ves. 434; *Patterson and Slaughter*, Ambl. 292, and 16 Ves. 350.

<sup>6</sup> 2 Bro. P. C. 71, Toml. ed.; *Pract. Reg.* 95, Wy. ed.; Ambl. 293.

<sup>7</sup> *Lord Portsmouth v. Lord Effingham*, 1 Ves. 430; *Bennett v. Lee*, 2

Atk. 529; and see *Willan v. Willan*, 16 Ves. 86.

<sup>8</sup> *Lord Portsmouth v. Lord Effingham*, 1 Ves. 430; *Young v. Keighly*, 16 Ves. 348. But leave to file a bill of review is matter of discretion with the court. See *Wilson v. Webb*, 2 Cox R. 3.

<sup>9</sup> *Jones v. Kendrick*, 5 Bro. P. C. 244, Toml. ed.; but the cause was compromised. *Hartwell v. Townsend*, 2 Bro. P. C. 107, Toml. ed.

<sup>10</sup> *Slingsby v. Hale*, 1 Cas. in Chan. 122; s. c. 1 Eq. Cas. Abr. 164.

<sup>11</sup> See 16 Ves. 354.

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\* A person who was not a party to a suit for the construction of a will, may file a bill, after a decree enrolled in that suit, to have the construction of the will reconsidered and redetermined, without leave of the court. (*Urquhart v. Urquhart*, 13 Sim. 623.)

review have been founded has not always been new matter to be used as evidence to prove matter in issue, in some manner, in the original bill.<sup>1</sup> A case, indeed, can rarely happen in which new matter discovered would not be, in some degree, evidence of matter in issue in the original cause, if the pleadings were properly framed. Thus, if after a decree, founded on a revocable deed, a deed of revocation and new limitations were discovered; as it would be a necessary allegation of title under the revocable deed that it had not been revoked, the question of revocation would have been in issue in the original cause, if the pleadings had been properly framed. So if after a decree founded on a supposed title of a person claiming as heir, a settlement or will were discovered which destroyed or qualified that title, it would be a necessary allegation of the title of the person claiming as heir, that the ancestor died seized in fee simple, and intestate. But if a case were to arise in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree, it should seem that it might be used as ground for a bill of review, if relief could not otherwise be obtained.<sup>2</sup>\* It is scarcely possible, however, that such a case should arise which might not be deemed in some degree a case of fraud,

<sup>1</sup> Ambl. 293.

<sup>2</sup> This court refused its leave to file a bill of review, where it would have been the means of introducing an entirely new case, of the matter of which the plaintiff was sufficiently well apprized to have been able, with the exertion of reasonable diligence, to have brought the same at first completely before the court. *Young v. Keighly*,

16 Ves. 348. And see *Ord v. Noel* (6 Madd. 127), and *Bingham v. Dawson* (1 Jac. R. 243), which, although cases relating to supplemental bills in the nature of bills of review, illustrate this principle. See also *Ludlow v. Lord Macartney*, 2 Bro. C. C. 67, Toml. ed.; *Le Neve v. Norris*, 2 Bro. P. C. 73, Toml. ed.; *M'Neill v. Cahill*, 2 Bligh P. C. 228.

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\* See *Partridge v. Usborne*, note \* to page 185, *infra*.

and the decree impeachable on that ground. In the case where the doubt before mentioned appears to have been stated, the new matter discovered, and alleged as ground for a bill of review, was a purchase for valuable consideration, without notice of the plaintiff's title: this could only be used as a defense; and it seems to have been thought that although it might have been proper, under the circumstances, if the new matter had been discovered before the decree, to have allowed the defendant to amend his answer and put it in issue, yet it could not be made the subject of a bill of review, because it created no title paramount to the title of the plaintiff, but merely a ground to induce a court of equity not to interfere. And where a settlement had been made on a marriage in pursuance of articles, and the settlement following the words of the articles had made the husband tenant for life, with remainder to the heirs male of his body, and the husband claiming as tenant in tail under the settlement had levied a fine, and devised to trustees, principally for the benefit of his son, and the trustees had obtained a decree to carry the trusts of the will into execution against the son, the son afterwards, on discovery of the articles, brought a bill to have the settlement rectified according to the articles, and a decree was made accordingly. In this case the new matter does not appear to have been evidence of matter in issue in the first cause, but created a title adverse to that on which the first decree was made.<sup>1</sup>

A bill of review upon new matter discovered has been permitted even after an affirmance of the decree

<sup>1</sup> *Roberts v. Kingsly*, 1 Ves. 238. If this case is accurately reported, the bill seems to have been filed without the previous leave of the court; and on

hearing an inquiry was directed as to the fact of the discovery of the articles. See *Young v. Keighly*, 16 Ves. 348.

in parliament;<sup>1</sup> but it may be doubted whether a bill of review upon error in the decree itself can be brought after affirmance in parliament.<sup>2</sup> If upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal.<sup>3</sup> But when twenty years have elapsed from the time of pronouncing a decree, which has been signed and enrolled, a bill of review cannot be brought;<sup>4</sup> and after a demurrer to a bill of review has been allowed, a new bill of review on the same ground cannot be brought.<sup>5</sup> It is a rule of the court, that the bringing a bill of review shall not prevent the execution of the decree impeached; and if money is directed to be paid, it ought regularly to be paid before the bill of review is filed, though it may afterwards be ordered to be refunded.<sup>6</sup>\*

In a bill of this nature it is necessary to state<sup>7</sup> the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it;<sup>8</sup> and the

<sup>1</sup> *Barbon v. Searle*, 1 Vern. 416; and see 16 Ves. 89.

<sup>2</sup> 1 Vern. 418.

<sup>3</sup> 2 Chan. Pract. 633; and see *Neal v. Robinson*, Dick. 15; but see 1 Vern. 417.

<sup>4</sup> *Sherrington v. Smith*, 2 Bro. P. C. 62, Toml. ed.; *Smythe v. Clay*, 1 Bro. P. C. 453, Toml. ed.; *Edwards v. Car-*

*roll*, 2 Bro. P. C. 98, Toml. ed.; *Lytton v. Lytton*, 4 Bro. C. C. 441.

<sup>5</sup> *Dunny v. Filmore*, 1 Vern. 135.

<sup>6</sup> Ord. in Cha. Ed. Bea. 3; 2 Brown P. C. 65, Toml. ed. note.

<sup>7</sup> 2 Prax. Alm. Cur. Can. 520; 2 Chan. Prac. 629.

<sup>8</sup> 4 Vin. Abr. 414, pl. 5.

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\* By the third and fourth of Lord Bacon's orders, "No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed." The true interpretation of these words is this—that before a party can file a bill of review or a bill of the nature of a bill of review, even by leave, he must perform so much of the decree as he is bound to perform at that time. But he may file a bill of review, or a bill of the nature of a bill of review at any time after leave is obtained, even before he has performed the decree, as regards those things which by the decree he was not bound to perform till a period subsequent to the time when such leave is obtained. (*Partridge v. Usborne*, 5 Russ. 195.)

law, or new matter discovered, upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it,<sup>1</sup> and the fact of the discovery.<sup>2</sup> It has been doubted whether after leave given to file the bill, that fact is traversable; but this doubt may be questioned if the defendant to the bill of review can offer evidence that the matter alleged in the bill of review was within the knowledge of the party who might have taken the benefit of it in the original cause.<sup>3</sup> The bill may pray simply that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution.<sup>4</sup> If it has been carried into execution, the bill may also pray the further decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand.<sup>5</sup> The bill may also, if the original suit has become abated, be at the same time a bill of revivor.<sup>6</sup> A supplemental bill may likewise be added, if any event has happened which requires it;<sup>7</sup> and particularly if any person not a party to the original suit be-

<sup>1</sup> See 1 Vern. 292; Boh. Curs. Canc. 396, 397.

<sup>2</sup> Hanbury against Stevens, Trin. 1784, in Chancery.

<sup>3</sup> In the above mentioned case of Hanbury and Stevens, which was upon a supplemental bill in nature of a bill of review, the court seemed to be of opinion that the fact of the discovery

was traversable; and not being admitted by the defendant, ought to have been proved by the plaintiff to entitle him to proceed to the hearing of the cause.\*

<sup>4</sup> 17 Ves. 177.

<sup>5</sup> 2 Chan. Prac. 634.

<sup>6</sup> 2 Prax. Alm. Cur. Canc. 522.

<sup>7</sup> Price v. Keyte, 1 Vern. 135.

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\* See 1 Bland Ch. Rep. 506; 2 Daniels' Plead. & Prac. 1584, and note, 4th Am. ed. by Perkins.



comes interested in the subject, he must be made a party to the bill of review by way of supplement.<sup>1</sup>

To render a bill of review necessary, the decree sought to be impeached must have been signed and enrolled. If, therefore, this has not been done, a decree may be examined and reversed upon a species of supplemental bill, in the nature of a bill of review, where any new matter has been discovered since the decree.<sup>2</sup>\* As a decree not signed and enrolled may be altered upon a rehearing, without the assistance of a bill of review, if there is sufficient matter to reverse

<sup>1</sup> *Sands v. Thorowgood*, Hardr. 104.

<sup>2</sup> 2 Atk. 40, 178; 3 Atk. 811; *Gartside v. Isherwood*, Dick. 612; 17 Ves. 177; or, at the least, the new matter should have been discovered after the

time when it could have been introduced into the original cause. *Ord v. Noel*, 6 Madd. 127; and see *Barrington v. O'Brien*, 2 Ball & B. 140.

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\* A plaintiff, or a defendant against whom a decree is made, may obtain leave to file a supplemental bill in the nature of a bill of review, to bring forward matter discovered after such decree, although such matter is not capable of being used as evidence of anything previously put in issue, but constitutes an entirely new issue. (*Partridge v. Usborne*, 5 Russ. 195; *Barnes v. Offer*, 5 Russ. 225, note.) Thus, where a person who is afterwards decreed to perform a contract for the purchase of a timber estate, applies to the auctioneer for, and obtains a written statement of the quantity of timber by a surveyor, before he bids for the estate; and after being decreed to perform his contract, he discovers that the quantity of timber is much less than is represented in such statement, the court will give him leave to file a supplemental bill in the nature of a bill of review, and to apply to have the original cause set down to be reheard, and to come on at the same time, although his answer to the original bill does not raise any objection as to the quantity of timber. (*Partridge v. Usborne*, 5 Russ. 195.) In this case the purchaser adduced evidence of the auctioneer and others to show that the auctioneer warranted the quantity of timber, and stated that the admeasurement exhibited by him to the purchaser agreed with another admeasurement by another eminent surveyor, although in reality the two materially differed. But the fact of the warranty was controverted by the evidence of a greater number of persons; and neither that fact nor the other circumstance above mentioned was adverted to in the judgment of the lord chancellor, Lord Lyndhurst.

it appearing upon the former proceedings,<sup>1</sup>\* the investigation of the decree must be brought on by a petition of rehearing;<sup>2</sup> and the office of the supplemental bill, in nature of a bill of review, is to supply the defect which occasioned the decree upon the former bill.<sup>3</sup> It is necessary to obtain the leave of the court to bring a supplemental bill of this nature,<sup>4</sup> and the same affidavit is required for this purpose as is necessary to

<sup>1</sup> The rehearing, which is thus far alluded to, not being sought in respect of any new matter, is obtained upon certificate of counsel (18 Ves. 325), by a petition merely, which states the case as brought before the court when the decree was made (*Wood v. Griffiths*, 1 Meriv. 35), and the grounds on which the rehearing is prayed. (1 Sch. & Lefr. 398.) And here it may not be improper to notice, that the court will not, without consent (3 Swanst. 234), vary a decree after it has been passed and entered, except as to mere clerical errors (*Lane v. Hobbs*, 12 Ves. 458; *Weston v. Haggerston*, Coop. R. 134; *Hawker v. Duncombe*, 2 Madd. R. 391; 3 Swanst. 234; *Tomlins v. Palk*, 1 Russ. R. 475), or matters of course (7 Ves. 293; *Pickard v. Mattheson*, 7 Ves. 293; *Newhouse v. Mitford*, 12 Ves. 456), unless upon a petition of rehearing, or upon a bill of review, or bill in the nature of a bill of review (4 Madd. 32; *Grey v. Dickenson*, 4 Madd. 464;

*Brackenbury v. Brackenbury*, 2 Jac. & W. 391; *Willis v. Parkinson*, 3 Swanst. 233; *Brookfield v. Bradley*, 2 Sim. & Stu. 64), according as the decree has or has not been signed and enrolled, and as it is sought to have the case reheard as originally brought before the court, or accompanied with new matter. See Text.

<sup>2</sup> *Taylor v. Sharp*, 3 P. Wms. 371; 2 Ves. 598; *Gore v. Purdon*, 1 Sch. & Lefr. 234; 2 Jac. & W. 393. It must be remarked that where there is new matter, a petition to rehear the original cause must be presented, and be brought before the court at the same time as the supplemental bill, in the nature of a bill of review. *Moore v. Moore*, Dick. 66; 17 Ves. 178.

<sup>3</sup> *Standish v. Radley*, 2 Atk. 177.

<sup>4</sup> Order, 17 Oct. 1741, Ord. in Chan. ed. Bea. 366; 2 Atk. 139, note; 3 Atk. 811; 2 Ves. 597, 598; *Bridge v. Johnson*, 17 Dec. 1737.

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\* Where in a suit for the administration of a testator's personal estate, part of which is undisposed of, the bill sets forth the will of the testator, made some years before his death, in which he is described as of a certain colony, where the effects of intestates are not distributed according to the English statute of distributions; but the bill prays that the property undisposed of may be distributed according to that statute; and there is no allegation that the testator was domiciled in the colony, or that the law of England is not applicable to the distribution of his property, either in the bill, or in the answers, or in the master's report, or in the evidence, or at the hearing; and the property is ordered to be distributed according to the statute; but afterwards a petition for a rehearing is presented, in which those facts are alleged as a ground for a rehearing; such petition will be dismissed. (*Nevinson v. Stables*, 4 Russ. 210.)

obtain leave to bring a bill of review on discovery of new matter.<sup>1</sup>\* The bill in its frame nearly resembles

<sup>1</sup> As to the general principles adopted by the court in relation to bills of this kind, see *Ord v. Noel*, 6 Madd. 127; *Bingham v. Dawson*, 1 Jac. R. 243.

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\* Where a decree is made against executors, not charging them with what they might have received but for their willful default, but afterwards a bill is filed which seeks so to charge them, it is a supplemental bill in the nature of a bill of review, and must not be filed without the leave of the court. (*Hodson v. Ball*, 11 Sim. 456; 1 Phil. 177.)

And where a vendor contracts to sell leasehold premises for the remainder of a term granted by a certain lessor, and the specific performance of the contract is decreed, the purchaser may not, without the leave of the court, file a supplemental bill, stating the fact that the premises called by the name by which they are designated in the contract partly consist of premises comprised in a lease granted by another lessor, and praying a declaration that the premises comprised in both leases are comprised in the contract, and that the contract may be specifically performed accordingly. For where a supplemental bill is brought to supply a defect in the pleadings and decree in the original cause, and the decree upon it can only be obtained on a rehearing of the decree in the original cause, such bill is a supplemental bill in the nature of a bill of review, which ought not to be filed without the leave of the court. (*Davis v. Black*, 6 Beav. 393.)

Where a supplemental bill seeks a species of relief which may be inconsistent with the relief afforded by the decree in the original suit, though it be only in one respect, and that in regard to the transactions of a few days, the bill is irregular, if filed without leave of the court; and the defendants are not precluded from insisting on the irregularity, by having answered the bill; because, although the defendants should waive the objection arising from the want of leave to file the bill, yet the court itself would be concerned to prevent inconsistent decrees from being made. Such an irregularity may, however, be corrected by a stay of the proceedings, without prejudice to the plaintiff's right to file a new bill, or to apply for leave of the court to file a bill of review.

This point arose in a case where the plaintiffs would have been entitled, in the original suit, to interest on the amount due to the estate of a deceased partner whom they represented; but by a supplemental bill they sought for a declaration that they were entitled, at their option, either to participate in the profits made by the defendant, the surviving partner, after the death of the deceased partner, or to be allowed interest upon the balance due to the deceased partner's estate. (*Toulmin v. Copland*, 4 Hare, 41.)

a bill of review, except that instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires.<sup>1</sup>

3. If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest,<sup>2</sup> relief may be obtained against error in the decree by a bill in the nature of a bill of review.<sup>3</sup> Thus, if a decree is made against a tenant for life only, a remainder-man in tail or in fee cannot defeat the proceedings against the tenant for life but by a bill showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court.<sup>4</sup>

4. If a decree has been obtained by fraud, it may be impeached by original bill<sup>5</sup> without the leave of

<sup>1</sup> See 17 Ves. 177, 178.

<sup>2</sup> *Brown v. Vermuden*, 1 Cas. in Chan. 272.

<sup>3</sup> See 17 Ves. 178.

<sup>4</sup> *Osborne v. Usher*, 6 Bro. P. C. 20, Toml. ed.

<sup>5</sup> 1 P. Wms. 736; *Loyd v. Mansell*, 2 P. Wms. 73; 3 P. Wms. 111; *Wichalse v. Short*, 3 Bro. P. C. 558, Toml. ed.; and see *Kennedy v. Daly*, 1 Sch. & Lefr. 355; and *Giffard v. Hort*, 1 Sch. & Lefr. 386. In 3 P. Wms. 111,

the court; the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained the court will restore the parties to their former situation, whatever their rights may be.<sup>2</sup> Besides cases of direct fraud in obtaining a decree, it seems to have been considered that where a decree has been made against a trustee, the *cestui que trust* not being before the court, and the trust not discovered, or against a person who has made some conveyance or incumbrance not discovered, or where a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit, the concealment of the trust, or subsequent conveyance, or incumbrance, or will, in these several cases, ought to be treated as a fraud.<sup>3</sup> It has been also said that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill.<sup>4</sup> When a decree has been made by consent, and the consent has been fraudulently obtained, the party grieved can only be relieved by original bill.<sup>5</sup>

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached. The

it is said that a decree in such case may be set aside on petition; but this was probably meant to extend only to the case of a decree not signed and enrolled, and where the fact of fraud could not be controverted. See *Mus- sel v. Morgan*, 3 Bro. C. C. 74; 2 Sch. & Lefr. 574\*.

<sup>1</sup> 3 Atk. 811; 1 Ves. 120; Cas. temp. Talbot, 201.

<sup>2</sup> *Birne v. Hartpole*, 5 Bro. P. C. 197, Toml. ed.; and see *Powell v.*

*Martin*, 1 Jac. & W. 292. And it may be remarked, that where the enrollment of the decree by the one party is a fraud or surprise upon the other, it will be vacated. *Stevens v. Guppy*, 1 Turn. R. 178.

<sup>3</sup> See *Style v. Martin*, 1 Cas. in Chan. 150; *Earl of Carlisle v. Goble*, 3 Chan. Rep. 94.

<sup>4</sup> 1 P. Wms. 737; 2 Ves. 232.

<sup>5</sup> *Ambl.* 229.

prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decision of the court.

5. The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus, during the troubles after the death of Charles the First, upon a decree for a foreclosure in case of non-payment of principal, interest and costs, due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequences of his engagements with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court, upon a new bill, enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree.<sup>1</sup>

6. Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the court.<sup>2</sup> This happens, generally, in cases where the parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of

<sup>1</sup> *Cocker v. Bevis*, 1 Cas. in Chan. 61. See also *Venables v. Foyle*, 1 Cas. in Chan. 3; and *Whorewood v. Whorewood*, 1 Cas. in Chan. 250; *Wakelin v. Walthal*, 2 Cas. in Chan. 8. The embarrassments occasioned by the civil war in the reign of Charles I, and the state of affairs after his death, before the restoration of Charles II, occasioned many extraordinary applications to the Court of Chancery for relief, and per-

haps induced the court to go far in extending relief; but there were many cases of extreme hardship in which it was deemed impossible, consistently with established principles, to give relief; and all cases determined soon after the restoration, upon circumstances connected with the prior disturbed state of the country, ought to be considered with much caution.

<sup>2</sup> 2 Chan. Rep. 128; 2 Vern. 409.

subsequent events, that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution.<sup>1</sup> Or it may be brought by or against a person claiming as assignee of a party to the decree.<sup>2</sup> The court in these cases in general only enforces, and does not vary, the decree; but on circumstances it has sometimes considered the directions, and varied them in case of a mistake;<sup>3</sup> and it has even on circumstances refused to enforce the decree,<sup>4</sup> though in other cases the court, and the House of Lords, upon an appeal, seem to have considered that the law of the decree ought not to be examined on a bill to carry it into execution.<sup>5</sup> Such a bill may also be brought to carry into execution the judgment of an inferior court of equity<sup>6</sup> if the jurisdiction of that court is not equal to the purpose; as in the case of a decree in Wales, which the defendant avoided by flying into England;<sup>7</sup> but in this case the court

<sup>1</sup> See peculiar case of *Rylands v. Latouche*, 2 Bligh P. C. 566.

<sup>2</sup> *Organ v. Gardiner*, 1 Cas. in Chan. 231; *Lord Carteret v. Paschal*, 3 P. Wms. 197; s. c. on appeal, 2 Bro. P. C. 10, Toml. ed.; *Binks v. Binks*, rep. 2 Bligh P. C. 593, note.

<sup>3</sup> See, for example, *Hamilton v. Houghton*, 2 Bligh P. C. 164; and see *Sel. Cas. in Chan.* 13.

<sup>4</sup> *Att. Gen. v. Day*, 1 Ves. 218; 1 Ves. 245; *Johnson v. Northey*, Prec. in Chan. 134; s. c. 2 Vern. 407. In the last case the lord keeper (1700) seemed to think that a bill by creditors to carry into execution a decree in favor of their debtor had opened that decree. In the case of *Sir John Worden v. Gérard*, in Ch., 1718, the interests of an infant party being affected by the decree, the

court refused to carry it into execution upon a bill for that purpose, and made a decree according to the rights of the parties. See *Lechmere v. Brasier*, 2 Jac. & W. 287. But in *Shephard v. Titley*, 2 Atk. 348, on a bill to foreclose a mortgage, after a bill to redeem, on which a decree had been made, the bill of foreclosure insisting on an incumbance not noticed in the former cause, the latter was on hearing ordered to stand over, that the question might be brought on by rehearing of the former cause, or by bill of review.

<sup>5</sup> 2 Ves. 232; *Smythe v. Clay*, 1 Bro. P. C. 453, Toml. ed.; see also *Minshull v. Lord Mohun*, 2 Vern. 672, and s. c. on appeal, 6 Bro. P. C. 32, Toml. ed.

<sup>6</sup> 1 Roll. Abr. 373.

<sup>7</sup> *Morgan v. —*, 1 Atk. 408.

thought itself entitled to examine the justice of the decision, though affirmed in the House of Lords.<sup>1</sup>

A bill for this purpose is, generally, partly an original bill, and partly a bill in the nature of an original bill, though not strictly original;<sup>2</sup> and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The frame of the bill is varied accordingly.

7. It has been already mentioned,<sup>3</sup> that when the interest of a party dying is transmitted to another in such a manner that the transmission may be litigated in this court, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but that such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him; and that this benefit is to be obtained by an original bill in nature of a bill of revivor. A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. The bill is said to be original merely for want of that privity of title between the party to the former and the party to the latter bill, though claiming the same interest, as would have permitted the continuance of the suit by a bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill

The case referred to of a decree in Wales seems to have been a case of *Halford v. Morgan*.

<sup>1</sup> See Douglas, 6.

<sup>2</sup> In the case of *Pott v. Gallini*, a

decree in a former suit was, in effect, extended upon an original bill. 1 Sim. & Stu. 206.

<sup>3</sup> See above, p. 169.



shall be equally bound by or have advantage of the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest;<sup>1</sup> and the suit is considered as pending from the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by the original bill, if it could have been continued by bill of revivor merely.<sup>2</sup>

8. It has been also mentioned,<sup>3</sup> that if the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but that by an original bill in the nature of a supplemental bill the benefit of the former proceedings may be obtained.<sup>4</sup> A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the person so become entitled; and pray the decree of the court adapted to the case of the plaintiff in the new bill.<sup>5</sup> This bill, though partaking of the nature of a supplemental bill, is not

<sup>1</sup> *Clare v. Wordell*, 2 Vern. 548; 1 Eq. Cas. Abr. 83; *Minshull v. Lord Mohun*, 2 Vern. 672; *Mordaunt v. Minshull*, 6 Bro. P. C. 32, Toml. ed.; *Johnson v. Northey*, Prec. in Chan. 134; s. c. 2 Vern. 407; 1 Sim. & Stu. 495.

<sup>2</sup> *Child v. Frederick*, 1 P. Wms. 266.

<sup>3</sup> See above, p. 169.

<sup>4</sup> See *Houlditch v. Marquis of Don-egall*, 1 Sim. & Stu. 491.

<sup>5</sup> 6 Bro. P. C. 24, Toml. ed.

an addition to the original bill, but another original bill, which in its consequences may draw to itself the advantage of the proceedings of the former bill.<sup>1</sup> \*

IV. Informations<sup>2</sup> in every respect follow the nature of bills, except in their style. When they concern only the rights of the crown, or of those whose rights the crown takes under its particular protection, they are exhibited in the name of the king's attorney or solicitor general as the informant; and, as before observed, in the latter case always, and in the former sometimes, a relator is named, who in reality sustains and directs the suit. It may happen that this person has an interest in the matter in dispute, and sustains the character of plaintiff as well as of relator; and in this case the pleading is styled an information and bill. An information concerning the rights of the queen is exhibited also in the name of her attorney general. The proceedings upon an information can only abate

<sup>1</sup> See 9 Ves. 55, above, pp. 169, 170.

<sup>2</sup> See above, pp. 117, 118.

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\* Where a defendant dies, after putting in his answer, and devising his estate, which the bill seeks to affect, to persons who are not parties to the bill, the plaintiff may, in another bill against such defendant, his devisees and executors, and a surviving party to the first bill, state the allegations contained in the first bill, and may introduce various passages of the answer, by way of pretense or otherwise, and meet such passages by charges, without rendering the second bill impertinent. For, as to the repetition of the statements contained in the first bill, that is necessary in order to enable the fresh parties to understand the nature of the case made by the first bill, of the contents of which it must be assumed that they are ignorant. And as to the insertion of passages from the answer and charges to meet them, the plaintiff is entitled to the same advantage against the devisees and executors as if they had been parties to the original bill, in which case he might have amended the original bill by stating the defendant's answer by way of pretense, and inserting charges to meet it. The second bill above mentioned may be termed an original bill in the nature of a supplemental bill, it being original as to the fresh parties, but supplemental as regards the former bill. (*Woods v. Woods*, 10 Sim. 193.)

by the death, or determination of interest, of the defendant. If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies, the court will not permit any further proceeding till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly,<sup>1</sup> otherwise there would be no person liable to pay the costs<sup>2</sup> of the suit in case the information should be deemed improper, or for any other reason should be dismissed.

The difference in form between an information and a bill consists merely in offering the subject-matter as the information of the officer in whose name it is exhibited, at the relation of the person who suggests the suit in those cases where a relator is named, and in stating the acts of the defendant to be injurious to the crown, or to those whose rights the crown thus endeavors to protect. When the pleading is at the same time an information and bill it is a compound of the forms used for each when separately exhibited.<sup>3</sup>

<sup>1</sup> Att. Gen. *v.* Powell, Dick. 355. And the application must be made by the attorney general, or with his consent. Att. Gen. *v.* Plumtree, 5 Madd. 452; Wellbeloved *v.* Jones, 1 Sim. & Stu. 40; and see Anon. Sel. Cas. in Chan. 69; Att. Gen. *v.* Fellows, 1 Jac. & W. 254.

<sup>2</sup> 1 Ves. 72; Att. Gen. *v.* Middleton, 2 Ves. 327.

<sup>3</sup> It may here be observed, with respect to informations on behalf of public charities, that the practice of this court has been to control the governors or other directors of them; in those cases only in which they have had the disposition of its revenues; and that this limited authority has been exerted under its general jurisdiction in relation to trusts; although it has gone beyond the ordinary cases on that subject by regulating the exercise of their

discretion. 2 Ves. 89; 2 Ves. 328; Att. Gen. *v.* Foundling Hospital, 2 Ves. jr. 42; s. c. 4 Bro. C. C. 165; Att. Gen. *v.* Dixie, 13 Ves. 519; Att. Gen. *v.* Earl of Clarendon, 17 Ves. 491; 3 Ves. & Bea. 154; Att. Gen. *v.* Brown, 1 Swanst. 265; Att. Gen. *v.* Mayor of Bristol, 3 Madd. 319; s. c. 2 Jac. & W. 294; Foley *v.* Wontner, 2 Jac. & W. 245; Att. Gen. *v.* Buller, 1 Jac. R. 407; Att. Gen. *v.* Heelis, 2 Sim. & Stu. 67; Att. Gen. *v.* Mayor of Stamford, reported 2 Swanst. 591; Att. Gen. *v.* Vivian, 1 Russ. R. 226. It has already been observed in the text, p. 115, that this court is empowered by the 52 Geo. III, c. 101, to interfere in such cases as relate only to the plain breach of trusts created for charitable purposes, on what is technically termed a petition in a summary way. As to which see also *Ex parte* Berkhamstead School, 2 Ves.

In this investigation of the frame and end of the several kinds of bills, the matters requisite to the sufficiency of each kind have been generally considered; but they will in some degree be more particularly noticed in the following chapter, in treating of the defense which may be made to the several kinds of bills, and consequently of the advantages which may be taken of their insufficiency both in form and substance.

& Bea. 134; *Ex parte* Rees, 3 Ves. & Bea. 10; *Ex parte* Brown, Coop. R. 295; *Ex parte* Skinner, 2 Meriv. 453; s. c. 1 Wils. R. 14; *Ex parte* Greenhouse, 1 Swanst. 60; s. c. 1 Wils. R. 18; *In re* Slewings Charity, 3 Meriv. 707; Att. Gen. v. Green, 1 Jac. & W. 303; *In re* Bedford Charity, 2 Swanst. 470; in the matter of St. Wenn's Charity, 2 Sim. & Stu. 66; and see 2 Swanst. 518, 525. And it may here be added, that it is also authorized to decide in certain other cases relating to the property of charities, upon a petition, by the 59 Geo. III, c. 91.

## CHAPTER II.

### OF THE DEFENSE TO BILLS.

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#### SECTION I.

#### *By whom a suit may be defended.*

IN treating of the defense which may be made to a bill, it will be proper to consider, I. By whom a suit may be defended. II. The nature of the various modes of defense; under which head will be considered, 1, demurrers; 2, pleas; 3, answers and disclaimers, or any two or more of them jointly, each referring to a separate and distinct part of the bill.

When the interest of the crown, or of those whose rights are under its particular protection, is concerned in the defense of a suit, the king's attorney general, or during the vacancy of that office the solicitor general, becomes a necessary party to support that interest;<sup>1</sup> but it has been already observed, that a suit in the court of chancery is not the proper remedy where the crown is in possession, or any title vested in it is sought to be divested, or affected,<sup>2</sup> or its rights are the immediate and sole object of the suit. The queen's attorney or solicitor seems to be the party necessary to defend her rights.<sup>3</sup>

<sup>1</sup> Balch v. Wastall, 1 P. Wms. 445; 2 Sch. & Lefr. 617. dowager has been sued as a common person. 9 Hen. VI, 53. Writ of annuity against Joan, Queen dowager of

<sup>2</sup> See above, p. 125.

<sup>3</sup> See 2 Roll. Abr. 213. But a queen Henry IV.

All other bodies politic and corporate, and persons who do not partake of the prerogative of the crown, and have no claim to its particular protection, defend a suit either by themselves, or under the protection of or jointly with others. Bodies politic and corporate, and persons of full age, not being married women, or idiots or lunatics, defend a suit by themselves; but infants, idiots and lunatics, are incapable by themselves of defending as they are of instituting a suit; and married women can only defend jointly with their husbands, except under particular circumstances, unless a special order is obtained to authorize or compel their defending separately.

Infants institute a suit by their next friend; but to defend a suit the court appoints them guardians, who are usually their nearest relations, not concerned in point of interest in the matter in question.<sup>1</sup> If a person is by age or infirmities reduced to a second infancy, he may also defend by guardian.<sup>2</sup>

Idiots and lunatics defend by their committees,<sup>3</sup> who are by order of the court appointed guardians for that purpose as a matter of course;<sup>4</sup> and if it happens that an idiot or a lunatic has no committee,<sup>5</sup> or the committee has an interest opposite to that of the person whose property is intrusted to his care,<sup>6</sup> an order may be obtained for appointing another person as guardian for the purpose of defending a suit.<sup>7</sup> So if

<sup>1</sup> *Offley v. Jenney*, 3 Chan. Rep. 51. On the subject of appointing guardians *ad litem* for infant defendants, see *Brassington v. Brassington*, 3 Anstr. 369; *Eyles v. Le Gros*, 9 Ves. 12; *Jongsma v. Pfiel*, 9 Ves. 357; *Williams v. Wynn*, 10 Ves. 159; *Hill v. Smith*, 1 Madd. 290; *Lushington v. Sewell*, 6 Madd. 28; *sed vide Tappen v. Norman*, 11 Ves. 563.

<sup>2</sup> *Leving v. Caverly*, Prec. in Chan. 229; 1 Eq. Cas. Abr. 281; *Wilson v.*

*Grace*, 14 Ves. 172; and see *Att. Gen. v. Waddington*, 1 Madd. 321.

<sup>3</sup> 1 Vern. 106; *Lyon v. Mercer*, 1 Sim. & Stu. 356.

<sup>4</sup> *Westcomb v. Westcomb*, Dick. 233.

<sup>5</sup> *Howlett v. Wilbraham*, 5 Madd. 423.

<sup>6</sup> *Snell v. Hyat*, Dick. 287; see *Lloyd v. —*, Dick. 460.

<sup>7</sup> *Howlett v. Wilbraham*, 5 Madd. 423.

a person who is in the condition of an idiot or a lunatic, though not found such by inquisition, is made a defendant, the court upon information of his incapacity will direct a guardian to be appointed.<sup>1</sup>

A married woman, though she cannot by herself institute a suit, and if her husband is not joined with her must seek the protection of some other person as her next friend, may yet, by leave of the court, defend a suit separately from her husband without the protection of another.<sup>2</sup> Thus, if she claims in opposition to any claims of her husband, or if she lives separate from him,<sup>3</sup> or disapproves the defense he wishes her to make,<sup>4</sup> she may obtain an order for liberty to defend the suit separately,<sup>5</sup> and her answer may be read against her.<sup>6</sup> If a husband is plaintiff in a suit, and makes his wife a defendant, he treats her as a feme sole, and she may answer separately without an order of the court for the purpose.<sup>7</sup> The wife of an exile, or of one who has abjured the realm, may defend, as she may sue alone;<sup>8</sup> and if a husband is out of the jurisdiction of the court,<sup>9</sup> though not an exile, or if he cannot be found,<sup>10</sup> his wife may be compelled to answer separately. If a married woman obstinately refuses to join in defense with her husband, she may also be com-

<sup>1</sup> Anon. 3 P. Wms. 111, note; see *Wilson v. Grace*, 14 Ves. 172.

<sup>2</sup> 4 Vin. Abr. 147, Baron and Feme, I. a. 20; 1 Sim. & Stu. 163.

<sup>3</sup> *Portman v. Popham*, Tothill, 75; *Jackson v. Haworth*, 1 Sim. & Stu. 161.

<sup>4</sup> *Ex parte Halsam*, 2 Atk. 50; 2 Eq. Cas. Abr. 66.

<sup>5</sup> *Powell v. Prentice*, Cas. t. Hardw. 258; *Wybourn v. Blunt*, Dick. 155. A separate answer put in by a married woman, without an order for the purpose, may be suppressed as irregularly filed. But if filed with her approbation, and accepted by the plaintiff, it will not be deemed irregular upon objection

taken by her merely for want of the order for leave to file it separately; and she will be bound by an offer contained in it. See *Duke of Chandos v. Talbot*, 2 P. Wms. 371; s. c. Sel. Cas. in Chan. 24.

<sup>6</sup> *Travers v. Buckley*, 1 Ves. 383.

<sup>7</sup> *Ex parte Strangeways*, 3 Atk. 478; *Brooks v. Brooks*, Prec. in Chan. 24; *Ainslie v. Medlicott*, 13 Ves. 266.

<sup>8</sup> See page 119; 19 Co. Litt. 132, b. 133, a.; and 2 Vern. 105.

<sup>9</sup> *Carleton v. M'Enzie*, 10 Ves. 442; *Bunyan v. Mortimer*, 6 Madd. 278.

<sup>10</sup> *Bell v. Hyde*, Prec. in Chan. 328.

pelled to make a separate defense; and for that purpose an order may be obtained that process may issue against her separately.<sup>1</sup> Except under such circumstances a married woman can only defend jointly with her husband.<sup>2</sup>

## SECTION II.—PART I.

### *Of the nature of the various modes of defense to a bill; and first of demurrers.*

It has been mentioned<sup>3</sup> that the person against whom a bill is exhibited, being called upon to answer the complaint made against him, may defend himself, 1. By demurrer, by which he demands the judgment of the court whether he shall be compelled to answer the bill or not.<sup>4</sup> 2. By plea, whereby he shows some cause why the suit should be dismissed, delayed, or barred.<sup>5</sup> 3. By answer, which, controverting the case stated by the plaintiff, confesses and avoids, or traverses and denies, the several parts of the bill;<sup>6</sup> or, admitting the case made by the bill, submits to the judgment of the court upon it, or upon a new case made by the answer, or both: or by disclaimer, which at once terminates the suit, the defendant disclaiming all right in the matter sought by the bill.<sup>7</sup> And all or any of these modes

<sup>1</sup> *Pain v. —*, 1 Cas. in Chan. 296; 1 Sim. & Stu. 163.

<sup>2</sup> As to the answer of a married woman, see further, *Plomer v. Plomer*, 1 Ch. Rep. 68; *Wrottesley v. Bendish*, 3 P. Wms. 235; *Penne v. Peacock*, Cas. t. Talb. 41; *Murriet v. Lyon*, Bunbury, 175; *Ex parte Halsam*, 2 Atk. 50; *Traverse v. Buckley*, 1 Wils. R. 264; *Barry v. Cane*, 3 Madd. 472; *Jackson*

*v. Haworth*, 1 Sim. & Stu. 161; *Garey v. Whittingham*, 1 Sim. & Stu. 163; *Bushell v. Bushell*, 1 Sim. & Stu. 164.

<sup>3</sup> Pages 110, 111, 112, 113.

<sup>4</sup> Pract. Reg. 162, Wy. ed.

<sup>5</sup> Ibid. 324, Wy. ed.

<sup>6</sup> 2 West. Symb. Chan. 194; Pract. Reg. 11, Wy. ed.

<sup>7</sup> Pract. Reg. 175, Wy. ed.



of defense may be joined, provided each relates to a separate and distinct part of the bill.

It has also been observed that the grounds on which defense may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel the answer which the bill requires, are various both in their nature and in their effect. Some of them, though a complete defense as to any relief, are not so as to a discovery; and when there is no ground for disputing the right of the plaintiff to the relief prayed, or if the bill seeks only a discovery, yet if there is any impropriety in requiring the discovery, or if it can answer no purpose for which a court of equity ought to compel it, the impropriety of compelling the discovery, or the immateriality of the discovery if made, may be used as a ground to protect the defendant from making it. Different grounds of defense therefore may be applicable to different parts of a bill; and every species of bill requiring its own peculiar ground to support it, and its own peculiar form to give it effect, a deficiency in either of these points is a ground of defense to it.

Whenever any ground of defense is apparent on the bill itself,\* either from matter contained in it, or

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\* Allowing that a demurrer, founded on the ship registry acts, would hold to a bill respecting a ship, if the bill alleged that the ship was British built, an allegation that the ship was built by a builder described to be of a particular place in this country is not a sufficient allegation to ground upon it such a demurrer; because the ship may have been built by that builder in some other part of the world. (*Small v. Small*, 14 Sim. 119.)

But where two inconsistent statements are made in a bill, a defendant is entitled, upon demurrer, to adopt that which is most against the plaintiff's interest. So that where the plaintiff would have no right to institute the suit as issue in tail, and the bill sets forth the limitations of a settlement in such a manner as to show that the plaintiff's father is tenant for life, with remainder to the plaintiff as tenant in tail, but subsequent parts of the bill speak of the father as tenant in tail, and of the plaintiff as heir

from defect in its frame, or in the case made by it, the proper mode of defense is by demurrer. A demurrer is an allegation of a defendant, which, admitting the matters of fact<sup>1</sup> alleged by the bill to be true,\* shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer;<sup>2</sup> or that for some reason apparent on the face of a bill,<sup>3</sup> or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof.<sup>4</sup> The causes of demurrer are merely upon matter in the bill,<sup>5</sup> or upon the omission<sup>6</sup> of matter which ought to be therein or attendant thereon; and not upon any foreign matter alleged by the defendant.<sup>7</sup> The principal ends of a demurrer are,

<sup>1</sup> A demurrer confesses matter of fact only, and not matter of law. Lord Raym. 18; 1 Ves. jr. 78, 289; 2 Ves. & B. 95; 3 Meriv. 503; Cuthbert v. Creasy, 6 Madd. 189.

<sup>2</sup> Prac. Reg. 162, Wy. ed.

<sup>3</sup> Ord. in Chan. 26, Ed. Bea.

<sup>4</sup> 3 P. Wms. 80; Prac. Reg. 162, Wy. ed.; see 2 Sch. & Lefr. 206.

<sup>5</sup> 2 Ves. 247.

<sup>6</sup> 3 P. Wms. 395.

<sup>7</sup> Ord. in Chan. 26, Ed. Bea.

in tail; the defendant is entitled, on demurrer, to treat the bill as stating that the plaintiff is issue in tail, and not as tenant in tail. (*Vernon v. Vernon*, 2 My. & Cr. 145.) As to an inference on demurrer, see same case.

And when a plaintiff founds his case upon the allegation that a foreign country is recognized by the English government as an independent state, and that allegation is false, the judge is bound to know judicially that it is false, and to allow a demurrer depending on its falsity. For it is the duty of the judge in every court to take notice of public matters which affect the government of the country; and the courts of the sovereign should act in unison with the government of the sovereign. (*Taylor v. Barclay*, 2 Sim. 213.)

\* See note \* to p. 305, *infra*.

to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense. If no one of these ends is obtained, there is little use in a demurrer. For, in general, if a demurrer would hold to a bill, the court, though the defendant answers, will not grant relief upon hearing the cause. There have been, however, cases in which the court has given relief upon hearing, though a demurrer to the relief would probably have been allowed.<sup>1</sup> But the cases are rare.

Bills have been already considered under three general heads: 1, original bills; 2, bills not original; and, 3, bills in the nature of original bills. The several kinds of bills ranged under the second and third heads being consequences of bills treated of under the first head, the defense which may be made to original bills in its variety comprehends the several defenses which may be made to every other kind of bill, except such as arise from the peculiar form and object of each kind. In treating, therefore, of demurrers it will be convenient first to consider demurrers to original bills, under which head the nature of demurrers in general, and the principal grounds of demurrer to every kind of bill, will be necessarily noticed; the distinct causes of demurrer peculiar to the several other kinds of bills will then be mentioned; and, in the third place, will be considered the frame of demurrers in general, and the manner in which their validity is determined.

In treating of original bills, they have been divided

<sup>1</sup> 3 P. Wms. 150; 12 Mod. 171. It seems that the court, upon the argument of a demurrer, decides upon the facts as stated in the bill, whether if the cause were to proceed to a hearing, and they were proved or confessed, a decree would then be made. See 2 Ves. jr. 97; *Brook v. Hewitt*, 3 Ves. 253; 6 Ves. 686; 7 Ves. 245; 2 Sch. & Lefr. 638; 6 Madd. 95.

into bills praying relief, and bills not praying relief; and it has been mentioned that both require a discovery from the party against whom the bill is exhibited. Demurrers to original bills may, therefore, be considered under two heads; first, demurrers to relief, which frequently include a demurrer to discovery; and, secondly, demurrers to discovery only, which sometimes consequentially affect the relief. Under these heads will necessarily be considered the causes of demurrer, as well to bills which seek a discovery only as to such as likewise pray relief.

From what has been observed in a preceding page, it may be collected that the principal grounds of objection to the relief sought by an original bill, which can appear on the bill itself, and may therefore be taken advantage of by demurrer, are these:<sup>1</sup> I. That the subject of the suit is not within the jurisdiction of a court of equity; II. That some other court of equity has the proper jurisdiction; III. That the plaintiff is not entitled to sue by reason of some personal disability; IV. That he has no interest in the subject, or no title to institute a suit concerning it; V. That he has no right to call on the defendant concerning the subject of the suit; VI. That the defendant has not that interest in the subject which can make him liable to the claims of the plaintiff; VII. That for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays. To these may be added, VIII. The deficiency of the bill to answer the purpose of complete justice; and IX. The impropriety of confounding distinct subjects in the same

<sup>1</sup> It has been said that a defendant may demur to a bill if it appears upon the face of it to be brought for a very small sum; but it is most usual to apply

to the court that the bill may be dismissed. *Anon. Mosely*, 47, 356; *Anon. Bunbury*, 17; *Owens v. Smith, Comyn*, 715; *Brace v. Taylor*, 2 Atk. 253.

bill, or of unnecessarily multiplying suits. When the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer to the relief will also extend to the discovery; but if the discovery may have a further purpose, the plaintiff may be entitled to it, though he has no title to relief. In considering, therefore, these several grounds of demurrer to relief, such as may, and such as cannot, extend to discovery likewise, will be distinguished.

I. The general objects of the jurisdiction of a court of equity\* have been noticed in a former page;<sup>1</sup> and from thence it may be collected, that the jurisdiction, when it assumes a power of decision, is to be exercised, 1, where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; 2, where the courts of ordinary jurisdiction are made instruments of injustice; 3, where the principles of law by which the ordinary courts are guided give no right, but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent; and it may also be collected that courts of equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a juris-

<sup>1</sup> Pages 102, 103.

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\* The reader is referred generally to the Treatises on the subject of Equity Jurisprudence or Jurisdiction, as to this part of Lord Redesdale's Treatise, extending from this page to page 243, inasmuch as it belongs to that subject rather than to the subject of Equity Pleadings, and embraces a very wide field.

Adams' Equity is especially referred to; so is Story's Equity Jurisprudence and Spence's Equitable Jurisdiction.

diction, 4, to remove impediments to the fair decision of a question in other courts; 5, to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; 6, to restrain the assertion of doubtful rights in a manner productive of irreparable damage; 7, to prevent injury to a third person by the doubtful title of others; and 8, to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits; and further, that courts of equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction, 9, to compel a discovery, or obtain evidence which may assist the decision of other courts; and 10, to preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation.

1. Cases frequently occur in which the principles<sup>1</sup> by which the ordinary courts are guided in their administration of justice give a right, but from accident or fraud, or defect in their mode of proceeding, those courts can afford no remedy, or cannot give the most complete remedy; and sometimes the effect of a

<sup>1</sup>The existence of courts of equity in England, distinct from the courts of ordinary jurisdiction, has suggested an idea that the ordinary courts, and especially the courts of common law, have not in their administration of justice any recourse to such principles of decision as are merely rules of equity. But in fact those principles have been as constantly applied by the ordinary courts as by the courts of equity,\* except where they have clashed with established rules of the common law, and where the forms observed in the proceed-

ings of the ordinary courts have not admitted of the application. And from time to time the courts of common law have also been induced to admit, as grounds of their decision, rules established in the courts of equity, which they had before rejected as clashing with established rules of the common law; and for some purposes they have also noticed principles of decision established in the courts of equity, which the forms of proceeding in the courts of common law have not enabled them directly to enforce.

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\* See Smith's "Manual of Equity Jurisprudence," Introd. sec. I.

remedy attempted to be given by a court of ordinary jurisdiction is defeated by fraud or accident. In such cases courts of equity will interpose to give those remedies which the ordinary courts would give if their powers were equal to the purpose, or their mode of administering justice could reach the evil; and also to enforce remedies attempted to be given by those courts when their effect is so defeated.

Thus where an instrument on which a title is founded, as a bond, is lost, a court of equity will interfere to supply the defect occasioned by the accident, and will give the same remedy which a court of common law would have given if the accident had not happened.<sup>1</sup> If an instrument has been destroyed, or is fraudulently suppressed or withheld from the party claiming under it, courts of equity will also give relief;<sup>2</sup> as they will generally lend their aid whenever by fraud or accident a person is prevented from effectually asserting in the courts of ordinary jurisdiction rights founded on principles acknowledged by those courts.\*

In some instances courts of law have acted on the supposed destruction or suppression of an instrument, where formerly those courts conceived they could not act for want of the instrument, especially in the particular mode of proceeding. Thus in the case of a supposed suppression or destruction of a

<sup>1</sup> 1 Cas. in Chan. 11; 1 Eq. Cas. Abr. 92; 1 Atk. 287; Anon. 2 Atk. 61; Anon. 3 Atk. 17; 1 Ves. 344; 5 Ves. 238; 7 Ves. 19; East India Company v. Boddam, 9 Ves. 464; Seagrave v. Seagrave, 13 Ves. 439; Smith v. Bicknell, 3 Ves. & Bea. 51, note; Stokoe v. Robson, 3 Ves. & Bea. 51.

<sup>2</sup> See Lord Hunsdon's case, Hob.

109; Eyton v. Eyton, 2 Vern. 380; Sanson v. Rumsey, 2 Vern. 561; Dalston v. Coatsworth, 1 P. Wms. 731; Cowper v. Earl Cowper, 2 P. Wms. 720; Atkins v. Farr, 1 Atk. 287; Tucker v. Phipps, 3 Atk. 359; 1 Ves. 392; Saltern v. Melhuish, Ambl. 249; Bowles v. Stewart, 1 Sch. & Lefr. 209.

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\* See note \* to p. 207.

lease for lives under a power in a settlement, the supposed lessee was permitted to obtain on parol testimony a verdict and judgment in ejectment, upon a feigned demise, the form of the proceeding not requiring the lease in question to be in any manner stated in the pleadings, so that it could not appear upon the record under what title the recovery was had, or what specific lands were in the supposed lease, what were the lives for which it was granted, what the rent reserved, or what covenants bound either party; or whether the lease was or was not according to the powers under which it was alleged to have been made. The consequence necessarily was a suit in equity to have all those facts ascertained, and to restrain the execution of the judgment in ejectment in the mean time.\*

In restraining waste,\* by persons having limited interests in property, the courts of equity have generally proceeded on the ground of the common-law rights of the parties, and the difficulty of obtaining immediate preservation of property from destruction or irreparable injury by the process of the common law;<sup>1</sup> but upon this subject the jurisdiction has been extended to cases in which the remedies provided in those courts could not be made to apply.<sup>2</sup>

<sup>1</sup> See *Field v. Jackson*, Dick. 599; *Davis v. Leo*, 6 Ves. 784; *Smith v. Collyer*, 8 Ves. 89; 9 Ves. 356; 19 Ves. 154.

<sup>2</sup> As to the instances where the title is legal, and the courts of law admit the existence of an injury, but do not afford a remedy, see 2 Freem. 54; *Perrot v. Perrot*, 3 Atk. 94; 3 Atk. 210; *Farrant v. Lovel*, 3 Atk. 723; 3 Atk. 755, 756; *Mollineux v. Powell*, 3 P. Wms. 268, note; 3 Bro. C. C. 544; *Onslow v. —*, 16 Ves. 163; *Pratt v. Brett*, 2 Madd. R. 62; *Brydges v. Stephens*, 6 Madd. 279; as to those

where the title is equitable, see 19 Ves. 151, 155; and as to those where the injury is not acknowledged at law, which are cases of equitable waste, see *Chamberlyne v. Dummer*, 1 Bro. C. C. 166; s. c. Dick. 600; *Marquis of Downshire v. Sandys*, 6 Ves. 107; *Lord Tamworth v. Lord Ferrers*, 6 Ves. 419; *Williams v. M'Namara*, 8 Ves. 70; *Burges v. Lamb*, 16 Ves. 174; *Day v. Merry*, 16 Ves. 375; *Marchioness of Ormonde v. Kynersley*, 5 Madd. 369; *Lushington v. Boldero*, 6 Madd. 149; *Coffin v. Coffin*, 1 Jac. R. 70.

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\* See note \* to p. 207.



Where an act of parliament has expressly given a right, the courts of ordinary jurisdiction have been found incompetent to give, in all cases, a full and complete remedy, and the courts of equity have therefore interposed.\* Thus in the case of a person who had been discharged under an act for relief of insolvent debtors, by which his future effects were made liable to the demand of his creditors, but his person was protected; the court of chancery, exercising its extraordinary jurisdiction, enforced a judgment of a court of common law against his effects, which were so circumstanced as not to be liable to execution at the common law.<sup>1</sup>

Where parties by contract have given a right, but have not provided a sufficient remedy, the courts of equity have also interfered.\* Thus where a rent was settled upon a woman by way of jointure, but she had no power of distress, or other remedy at law, the payment, according to the intent of the conveyance, was decreed in equity.<sup>2</sup> So where parties, meaning to create a perfect title, have used an imperfect instrument, as a feoffment without livery of seizin;<sup>3</sup> a bargain and sale without enrollment;<sup>4</sup> a surrender of copyhold not presented according to the custom of the manor;<sup>5</sup> courts of equity have considered the imperfect instrument as evidence of a contract for making a perfect instrument, and have remedied the defect, even against judgment creditors<sup>6</sup> who had gained a lien in the land

<sup>1</sup> *Edgell v. Haywood*, 3 Atk. 352; 279; *Burgh v. Burgh*, Rep. t. Finch, see 1 Jac. & W. 371. 28.

<sup>2</sup> *Plunket v. Brereton*, 1 Chan. Rep. 5; and see *Duke of Leeds v. Powell*, 1 Ves. 171.

<sup>3</sup> *Burgh v. Francis*, cited 1 P. Wms.

<sup>4</sup> 6 Ves. 745.

<sup>5</sup> *Taylor v. Wheeler*, 2 Vern. 564.

<sup>6</sup> See 1 P. Wms. 279.

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\* See note \* to p. 207.

in question, though when the consideration has been inadequate, relief has not been extended so far.<sup>1</sup> Where the legislature has declared that an instrument wanting a particular form should be null and void to all intents and purposes, and it was manifestly the design of the legislature that those words should operate to the fullest extent, relief has been refused. Thus a bill of sale of a ship, wanting a formality required by the register act, was not made good in equity against assignees of the vendor become bankrupt.<sup>2</sup>

Relief has also been given where a remedy at law was originally provided, but by subsequent accident could not be enforced; as where, by confusion of boundaries of lands, remedy by distress for rent was defeated.<sup>3</sup> \* So if the remedy afforded by the ordinary courts is incomplete, a court of equity will lend its aid to give a complete remedy.<sup>4</sup> \* Upon this ground a bill was admitted for recovery of an ancient silver altar claimed by the plaintiff as treasure trove within his manor; for though he might have recovered at law the value in an action of trover, or the thing itself, if it could be found, in an action of detinue, yet as the defendant might deface it, and thereby depreciate the value, it was determined that the defect of the law in that particular ought to be supplied in equity.<sup>5</sup> And where an estate was held by a horn, and a bill was

<sup>1</sup> *Finch v. Earl of Winchelsea*, 1 P. Wms. 277, 283.

<sup>2</sup> *Hibbert v. Rolleston*, 3 Bro. C. C. 571; 6 Ves. 745; *Speldt v. Lechmere*, 13 Ves. 588; *Thompson v. Leake*, 1 Madd. 39.

<sup>3</sup> 1 Ves. 172. See *North v. Earl and Countess of Strafford*, 3 P. Wms. 148; *Bouverie v. Prentice*, 1 Bro. C. C.

200; and *Duke of Leeds v. Corporation of New Radnor*, 2 Bro. C. C. 338; s. c. Ib. 518, and the cases there cited.

<sup>4</sup> See 9 Ves. 33.

<sup>5</sup> *Duke of Somerset v. Cookson*, 3 P. Wms. 390; and see *Fells v. Read*, 3 Ves. 71; *Lowther v. Lord Lowther*, 13 Ves. 95.

brought by the owner of the estate to have the horn delivered to him, a demurrer was overruled.<sup>1</sup>

Upon the same principle,<sup>2</sup> the jurisdiction of the court is supported in the very common case of a bill for delivery of deeds or writings,<sup>3</sup> \* suggesting that they are in the custody or power of the defendant; though in early times it seems to have been considered that the jurisdiction did not extend to cases where an action of detinue would lie.<sup>4</sup>

In the case of contracts or agreements this principle is carried to the extent.\* The principles by which the courts of common law direct their decisions on the subject acknowledge the mutual right of the contracting parties to specific performance of the agreements they have made; but the mode of proceeding in those courts enables them only to attempt to compel performance by giving damages for non-performance. Here therefore the courts of equity interfere to give that remedy which the ordinary courts would give if their mode of administering justice would reach the evil, by decreeing, according to the principles of the common law as well as of natural justice, specific performance of the agreement.<sup>5</sup>

<sup>1</sup> *Pusey v. Pusey*, 1 Vern. 273; and see *Earl of Macclesfield v. Davis*, 3 Ves. & Bea. 16.

<sup>2</sup> See 2 Atk. 306.

<sup>3</sup> The court of chancery has long exercised its extraordinary jurisdiction in this case. See 9 Ed. IV, 41 B. and Stat. 32 Hen. VIII, c. 36, s. 9; and see on this subject *Brown v. Brown*, Dick. 62; 1 Madd. 192; *Crow v. Tyrrell*, 3 Madd. 179; *Knye v. Moore*, 1 Sim. & Stu. 61; *Balch v. Symes*, 1 Turn. 87.

<sup>4</sup> 9 Edw. IV, 41 B.; see also 39 Hen. VI, 26; *Brooke Prær*. 45, which seems to have been in effect a bill for discovery and account.

<sup>5</sup> 13 Ves. 76, 228; 2 Sch. & Lefr. 556; 1 Jac. & W. 370. The courts of equity decree performance of agreement in many cases where no action would lie at the common law for non-performance; and on this head great complaints have been made, the justice of which it is beyond the purpose of this treatise to consider. See 1 Fonbl. Treat. of Eq. 151, n. (c), and 2 Sch. & Lefr. 347, and *Williams v. Steward*, 3 Meriv. 472. As to the propriety of extending the application of the doctrine of part performance, see 3 Ves. 712, 713; 6 Ves. 32, 37; 2 Sch. & Lefr. 5.

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\* See note \* to p. 207.

This however extends only to contracts of which a specific performance is essential to justice;<sup>1</sup> for if damages for non-performance are all that justice requires, as in the case of a contract for stock in the public funds, a court of equity will not interfere.<sup>2</sup> In other cases where compelling a specific act is the only complete remedy for an injury, and the ordinary courts can attempt to give this remedy only by giving damages, the courts of equity will interfere to give the specific remedy, especially if the right has been established by the determination of the ordinary courts.<sup>3</sup>

In some cases, as in matters of account,<sup>4</sup> \* partition of estates between tenants in common,<sup>5</sup> and assign-

<sup>1</sup> See 3 Bro. C. C. 543; 8 Ves. 163; 2 Sch. & Lefr. 347.

<sup>2</sup> *Cud v. Rutter*, 1 P. Wms. 570; 10 Ves. 161; 13 Ves. 37.

<sup>3</sup> It is difficult to reconcile all the cases in which the courts of equity have compelled the performance of agreements, or refused to do so, with each other; and in some cases where performance has been decreed, it is difficult to reconcile the decisions with the principles of equal justice. The cases and their varieties are numerous, and have been ably collected in 1 Fonbl. Treat. of Equity. Of the later cases on the subject, see *Morphett v. Jones*, 1 Swanst. 172; s. c. 1 Wils. Ch. R. 100; *Garrard v. Grinling*, 2 Swanst. 1, 244; s. c. 1 Wils. Ch. R. 460; *Walker v. Barnes*, 3 Madd. 247; *Hudson v. Bartram*, 3

Madd. 440; *Franklyn v. Tuton*, 5 Madd. 469; *Dawson v. Ellis*, 1 Jac. & W. 524; *Baxter v. Conolly*, 1 Jac. & W. 576; *Martin v. Mitchell*, 2 Jac. & W. 413; *Beaumont v. Dukes*, 1 Jac. R. 422; *Gordon v. Smart*, 1 Sim. & Stu. 66; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Doloret v. Rothschild*, 1 Sim. & Stu. 590; *Lingen v. Simpson*, 1 Sim. & Stu. 600; *Agar v. Macklew*, 2 Sim. & Stu. 418; *Hasker v. Sutton*, 2 Sim. & Stu. 513; *Lewin v. Guest*, 1 Russ. R. 325; *Attwood v. —*, 1 Russ. R. 353.†

<sup>4</sup> See 2 Ves. 388; *Corporation of Carlisle v. Wilson*, 13 Ves. 276; 1 Sch. & Lefr. 309.

<sup>5</sup> See 2 Freem. 26; 2 Ves. jr. 570; *Turner v. Morgan*, 8 Ves. 143; 17 Ves. 552; 1 Ves. & B. 555; *Miller v. Warrington*, 1 Jac. & W. 484.

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\* See note \* to p. 207.

† The Court of Chancery, in carrying agreements in regard to title into execution, governs itself by a moral, and not a mathematical certainty. For, in the nature of things, there cannot be a mathematical certainty of a good title. There are often suggestions of old entails, and often doubts what issue persons have left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate. (2 Atk. 20.)

ment of dower,<sup>1</sup> a court of equity will entertain jurisdiction of a suit, though a remedy might perhaps be had in the courts of common law. The ground upon which the courts of equity first interfered in these cases seems to have been the difficulty of proceeding to the full extent of justice in the courts of common law.<sup>2</sup> Thus, though accounts may be taken before auditors in an action of account in the courts of common law, yet a court of equity by its mode of proceeding is enabled to investigate more effectually long and intricate accounts in an adverse way, and to compel payment of the balance whichever way it turns. \*

In the case of partition of an estate,† if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and upon return of the commission,

<sup>1</sup> See *Curtis v. Curtis*, 2 Bro. C. C. 620; 2 Ves. jr. 129; 17 Ves. 552. in some of these cases the jurisdiction was first assumed to prevent multiplicity

<sup>2</sup> 2 Ves. 388; 13 Ves. 279. Perhaps of suits.

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\* A bill for an account is not demurrable merely because the plaintiff does not offer to account at all, or does not offer to account for as much as he ought to account for; for he may be made to account to the full extent of what is just, although he does not even admit himself to be an accounting party. (*Clark v. Tipping*, 4 Beav. 588.)

If a bill is filed for an account of the rents and profits received by the grantee of an annuity, who, in consequence of its being in arrear, is in possession of the premises demised to secure the annuity, the bill must contain an offer either to redeem on the terms of the annuity deed, or to repurchase upon equitable terms to be settled by the court. (*Knebell v. White*, 2 Y. & C. Eq. Ex. 15.)

† See note \* to p. 207.

and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties.<sup>1</sup> But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition, give possession, and order enjoyment accordingly until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day to show cause against the decree after attaining twenty-one; and if no cause should be shown, or cause shown should not be allowed, the decree may then be extended to compel mutual conveyances.<sup>2</sup> If a contingent remainder, not capable of being barred or destroyed, should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined; in either of which cases a supplemental bill will be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment.<sup>3</sup>

In the case of dower\* the widow is often much embarrassed, in proceeding upon a writ of dower at the common law, to discover the titles of her deceased husband to the estates out of which she claims her dower, to ascertain their comparative value, and obtain a fair assignment of a third. How far the courts of equity will assist a widow in the assignment of dower has been at different times a subject of much question; but the result of various decisions seems to

<sup>1</sup> See *Cartwright v. Pultney*, 2 Atk. 380; 2 Sch. & Lefr. 372; 1 Jac. & W. 493.

<sup>2</sup> See *Att. Gen. v. Hamilton*, 1 Madd. 214.

<sup>3</sup> See the case of *Wills v. Slade*, 6 Ves. 498.

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\* See note \* to p. 207.

have settled, that where there is no ground of equity, as a purchase for valuable consideration,<sup>1</sup> to prevent their interference, the courts will proceed to set out dower; though if the title to dower be disputed, it must be first established at law.<sup>2</sup>

In all these cases the courts of equity will lend their aid; but they have generally considered themselves in so doing as proceeding merely on rights which may be asserted in a court of common law, and therefore in the two cases of partition and assignment of dower, as no costs can be given in a court of common law upon a writ of partition or a writ of dower, no costs have been commonly given in a court of equity upon bills brought for the same purposes;<sup>3</sup> and as arrears of dower can be recovered at common law only from demand, the same rule was adopted in the courts of equity, unless particular circumstances had occurred to warrant a departure from the course of the common law, founded on the terms of a statute.<sup>4</sup> The courts of equity having gone the length of assuming jurisdiction in a variety of complicated cases of account, of partition, and of assignment of dower, seem by degrees to have been considered as having on these subjects a concurrent jurisdiction<sup>5</sup> with the courts of

<sup>1</sup> *Williams v. Kambe*, 3 Bro. C. C. 264.

<sup>2</sup> *Curtis v. Curtis*, 2 Bro. C. C. 620; *Mundy v. Mundy*, 2 Ves. jr. 122. The last case was upon a demurrer, which after much consideration was overruled.\* Lord Talbot had overruled a demurrer under similar circumstances in *Moor v. Blake*, 26 July, 1735, reported Cas. temp. Talb. 126, by the name of *Moore and Black*. And a like decision was made in *Meggott v. Meggott*, in Chan. 15 Oct. 1743. But in *Read v. Read*, 15 Dec. 1744, the court retained the bill, and ordered the deeds to be produced, with liberty to the plaintiff to bring a writ of dower, which was also done in *Curtis v. Curtis*, 15 May

1778; finally reported in 2 Bro. C. C. 620. See also the case of *D'Arcy v. Blake*, 2 Sch. & Lefr. 387.

<sup>3</sup> See *Lucas v. Calcraft*, Dick. 594. With respect to costs in cases of partition, see *Calmady v. Calmady*, 2 Ves. jr. 568; *Agar v. Fairfax*, 17 Ves. 533; 1 Ves. & Bea. 554; and in cases of dower, see *Lucas v. Calcraft*, 1 Bro. C. C. 134; and s. c. 1 Ves. & Bea. 20, note; 2 Ves. 128; *Worgan v. Ryder*, 1 Ves. & Bea. 20.

<sup>4</sup> In the case of *Curtis v. Curtis*, 2 Bro. C. C. 620, this rule was not observed.

<sup>5</sup> 13 Ves. 279; 2 Sch. & Lefr. 309; 1 Ves. & Bea. 555.

common law in cases where no difficulty would have attended the proceedings in those courts.

But except in these instances, and in some cases noticed in a subsequent page, the courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice; and, therefore, in general, where a plaintiff can have as effectual and complete remedy in a court of law as in a court of equity, and that remedy is clear and certain,<sup>1</sup> a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold.<sup>2\*</sup>

If an accident is made a ground to give jurisdiction to the court in a matter otherwise clearly cognizable in a court of common law, as the loss or want of an instrument on which the plaintiff's title is founded, the court will not permit a bare suggestion in a bill to support its jurisdiction; but requires a degree of proof of the truth of the circumstance on which it is sought to transfer the jurisdiction from a court of common law to a court of equity,<sup>3</sup> by an affidavit of the plaintiff annexed to and filed with the bill. Thus, if a bill is brought to obtain the benefit of an instrument upon which an action at law would lie, alleging that it is lost, and that the plaintiff therefore cannot have remedy at law, an affidavit of the loss must be annexed to the bill, or a demurrer will hold.<sup>4</sup>

<sup>1</sup> Parry v. Owen, 3 Atk. 740; Ghettoff v. Lond. Assur. Comp. 4 Bro. P. C. 436, Toml. ed.; 1 Eq. Cas. Abr. 131; Bensley v. Burdon, 2 Sim. & Stu. 519.

<sup>2</sup> As courts of equity disclaim all right to decide upon the validity of wills, whether of real or of personal estate, a demurrer to a bill whereby

such a determination is sought will hold. See Jones v. Jones, 3 Meriv. 161; Jones v. Frost, 3 Madd. 1; s. c. Jac. R. 466.

<sup>3</sup> Whitechurch v. Golding, 2 P. Wms. 415; 3 Atk. 132.

<sup>4</sup> See Walmsley v. Child, 1 Ves. 342; Hook v. Dorman, 1 Sim. & Stu. 227.

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\* See Smith's Manual of Equity Jurisprudence, Introd. sec. I.



So in the case of a bill for discovery of any instrument, suggesting that it is in the custody or power of the defendant, and praying any relief which might be had at law if the instrument was in the hands of the plaintiff, an affidavit must be annexed to the bill that the instrument is not in his custody or power, and that he knows not where it is, unless it is in the hands of the defendant. But if the relief sought extends merely to the delivery of the instrument, or is otherwise such as can only be given in a court of equity, such an affidavit is not necessary.<sup>1</sup> It is also unnecessary in the case of a bill for discovery of a canceled instrument, and to have another deed executed;<sup>2</sup> for if the plaintiff had the canceled instrument in his hands, he could make no use of it at law, and indeed the relief prayed is such as a court of equity only can give.

A suggestion that the evidence of the plaintiff's demand is not in his power is essential to a bill under these circumstances; and if it is defective in this point, the defendant may by demurrer allege that there is no such charge in the bill.<sup>3</sup>

Where a right of action at law was in a trustee, and the person beneficially entitled filed a bill for relief, suggesting a refusal by the trustee to suffer an action to be brought in his name, a demurrer has been allowed;<sup>4</sup> and if a mere suggestion to this effect would support a bill, the jurisdiction in many cases might improperly be transferred from a court of law to a court of equity.

By demurring to a bill because the plaintiff may

<sup>1</sup> *Whitworth v. Golding*, Mos. 192; Nels. Rep. 78; *Anon.* 3 Atk. 17.

<sup>2</sup> *King v. King*, Mos. 192.

<sup>3</sup> 3 P. Wms. 395.

<sup>4</sup> *Ghettoff v. Lond. Assur. Comp.* 4 Brown P. C. 436, Toml. ed. And see 1 Atk. 547.

have remedy at law, the defendant will not be debarred of relief in equity upon another bill, if the plaintiff in the first bill should proceed at law and recover.<sup>1</sup>

This objection to a bill is not confined to cases cognizable in courts of common law. If any other court of ordinary jurisdiction, as an ecclesiastical court, court of admiralty, or court of prize, is competent to decide upon the subject, a demurrer will equally hold; except that the courts of equity have in the case of tithes, and in the disposition of the effects of persons dying testate or intestate, assumed a concurrent jurisdiction with the ecclesiastical courts, as far as the jurisdiction of those courts extends; and indeed the courts of equity in many of these cases can give more complete remedy than can be afforded in the ecclesiastical courts, and in some cases the only effectual remedy.

Courts of equity will also lend their aid to enforce the judgments of courts of ordinary jurisdiction;\* and therefore a bill may be brought to obtain the execution or the benefit of an *elegit*,<sup>2</sup> or a *fieri facias*,<sup>3</sup> when defeated by a prior title, either fraudulent, or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases, where courts of equity formerly lent their aid, the legislature has by express statute provided for the relief of creditors in the courts of common law, and consequently rendered the exertion of this jurisdiction in such cases unnecessary. In any case to procure relief in equity, the creditor must show

<sup>1</sup> *Humphreys v. Humphreys*, 3 P. Atk. 107; *Stileman v. Ashdown*, 2 Atk. Wms. 395. 608.

<sup>2</sup> *Lewkener v. Freeman*, Pr. in Chan. <sup>3</sup> *Smithier v. Lewis*, 1 Vern. 399; 105; *Higgins v. York Build. Comp.* 2 Balch v. Wastall, 1 P. Wms. 445.

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\* See note \* to p. 207.

by his bill that he has proceeded at law to the extent necessary to give him a complete title. Thus in the cases alluded to of an *elegit* and *fieri facias* he must show that he has sued out the writs the execution of which is avoided, or the defendant may demur;<sup>1</sup> but it is not necessary for the plaintiff to procure returns to those writs.<sup>2</sup>

The judgments of the ecclesiastical courts giving civil rights will receive the same aid from a court of equity as those of the courts of common law; and therefore where a person against whom there was a sentence in an ecclesiastical court at the suit of his wife for alimony, intended to avoid the execution of the sentence by leaving the kingdom, the Court of Chancery entertained a bill for a writ of *ne exeat regno*, to restrain him from leaving the kingdom until he had given security to pay the maintenance decreed.<sup>3</sup>

2. Sometimes a party, by fraud, or accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction which must necessarily make that court an instrument of injustice; and it is therefore against conscience that he should use the advantage.\* In such cases, to prevent a manifest wrong, courts of equity have interposed, by restraining the party whose conscience is thus bound from using the advantage he has improperly gained; and upon these principles bills to restrain proceedings in courts of

<sup>1</sup> *Angell v. Draper*, 1 Vern. 398; *Shirley v. Watts*, 3 Atk. 200.

<sup>2</sup> *Manningham v. Lord Bolingbroke*, *elegit*, Easter, 1777, in Chan.; *Kenard v. Moore*, in Chan. June 23, 1756; 2 Eq. Cas. Abr. 251; *King v. Marissal*, 3 Atk. 192; s. c. Ib. 200. But see *Balch v. Wastall*, 1 P. Wms. 445.

<sup>3</sup> *Read v. Read*, 1 Cas. in Chan. 115; *Sir Jerom. Smithson's Case*, 2 Vent. 345; *Anon.* 2 Atk. 210; *Ambl.* 76; *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, Ib. 173; *Oldham v. Oldham*, Ib. 410; *Haffey v. Haffey*, 14 Ves. 261.

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\* See note \* to p. 207.

ordinary jurisdiction are still frequent, though the courts of common law have been enabled, by the assistance of the legislature, as well as by a more liberal exertion of their inherent powers, to render applications of this nature to a court of equity unnecessary in many cases where formerly no other remedy was provided. Thus if a deed is fraudulently obtained without consideration, or for an inadequate consideration, or if by fraud, accident or mistake, a deed is framed contrary to the intention of the parties in their contract on the subject, the forms of proceeding in the courts of common law will not admit of such an investigation of the matter in those courts as will enable them to do justice. The parties claiming under the deed have therefore an advantage in proceeding in a court of common law which it is against conscience that they should use; and a court of equity will on this ground interfere to restrain proceedings at law until the matter has been properly investigated; and if it finally appears that the deed has been improperly obtained, or that it is contrary to the intention of the parties in their contract, will in the first case compel the delivery and cancellation of the deed, or order it to be deposited with an officer of the court; and will compel a reconveyance of property, if any has been so conveyed that a reconveyance may be necessary; and in the second case will either rectify the deed according to the intention of the parties, or will restrain the use of it in the points in which it has been framed contrary to, or in which it has gone beyond, their in-

See on this subject, *Bishop of Winchester v. Fournier*, 2 Ves. 445; *Bates v. Graves*, 2 Ves. jr. 287; *Pringle v. Hodgson*, 3 Ves. 617; *Wright v. Proud*, 13 Ves. 136; *Ware v. Horwood*, 14 Ves. 28; *Huguenin v. Baseley*, 14 Ves. 273; *Willan v. Willan*, 16 Ves. 72; *Murray v. Palmer*, 2 Sch. & Lefr. 474; *Walker v. Symonds*, 3 Swanst. 1; *Gordon v. Gordon*, 3 Swanst. 400; *Wood v. Abrey*, 3 Madd. 417; *Tweddell v. Tweddell*, 1 Turn. R. 1.

tention in their original contract.<sup>1</sup> The instances of the exercise of the jurisdiction of courts of equity in these cases, and especially in the case of a deed fraudulently obtained, are numerous.<sup>2</sup> On the ground of mistake the courts of equity have also frequently interfered in a variety of instances, and particularly in the cases of defective securities for money,<sup>3</sup> and of marriage settlements founded on previous articles, where the settlement has been contrary to the evident intention of the parties in the articles.<sup>4</sup>

The courts of equity will interfere upon the same grounds to relieve against instruments which destroy, as well as against instruments which create, rights; and therefore will prevent a release which has been fraudulently or improperly obtained from being made a defense in an action at law. And where a fine and non-claim were set up as a bar to an ejectment by an heir at law, who had filed a bill in equity before the time had run on the fine, for discovery of title deeds, and for other purposes, with a view to try his title at

<sup>1</sup> See 2 Atk. 33, 203; *Henkle v. Royal Exchange Assur. Comp.* 1 Ves. 317; *Rogers v. Earl, Dick.* 294; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Clowes v. Higginson*, 1 Ves. & Bea. 524; *Beaumont v. Bramley*, 1 Turn. R. 41; *Ball v. Storie*, 1 Sim. & Stu. 210; 2 Sim. & Stu. 178.

<sup>2</sup> It has been sometimes doubted whether the court ought to compel the delivery and cancellation of an instrument which ought not to be enforced, and whether the more proper course would not be to order a perpetual injunction to restrain the use of the instrument. See 1 Ves. jr. 284; *Ryan v. Mackmath*, 3 Bro. C. C. 15, and the cases there cited, and *Mason v. Gardiner*, 4 Bro. C. C. 436. But if the instrument ought not to be used, it is against conscience for the party holding it to retain it, as he can only retain it for some sinister purpose; and in the case of a negotiable instrument it may be used for a fraudulent purpose, to the

injury of a third person. See *Bromley v. Holland, Coop.* R. 9; 11 Ves. 535; 17 Ves. 112; 1 Ves. & Bea. 244; *Wynne v. Callander*, 1 Russ. R. 293; and see 2 Swanst. 157, note, where the leading authorities on this subject are collected. Of a forged instrument the court ought to take the custody; and in such a case the instrument has been generally ordered to be deposited with an officer of the court. *Bishop of Winchester v. Fournier*, 2 Ves. 445, and cases there cited.

<sup>3</sup> *Sims v. Urry*, 2 Cas. in Chan. 225; s. c. Rep. temp. Finch, 413, and 2 Freem. 16; *Burgh v. Francis*, 1 Eq. Cas. Abr. 320; *Taylor v. Wheeler*, 2 Vern. 564; *Jennings v. Moore*, 2 Vern. 609; *Bothomly v. Lord Fairfax*, 1 P. Wms. 334.

<sup>4</sup> On this subject, see *Randall v. Willis*, 5 Ves. 262; *Taggart v. Taggart*, 1 Sch. & Lefr. 84; *Blackburn v. Stables*, 2 Ves. & Bea. 367; 1 Turn. R. 52.

law, the House of Lords, upon an appeal, restrained the setting up the fine.<sup>1</sup> In many cases of accident, as lapse of time, the courts of equity will also relieve against the consequences of the accident in a court of law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law upon default of payment of the mortgage money at the time stipulated for payment.<sup>2</sup>

As the courts of equity will prevent the unfair use of an advantage in proceeding in a court of ordinary jurisdiction gained by fraud or accident, they will also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights. Upon this ground there are many instances of bills to prevent the effect of a judgment at law, and to obtain relief in equity where it was impossible by any means to have the matter properly investigated in a court of law; or where the matter might be so investigated, to bring it again into a course of trial.<sup>3</sup>

Bills of the latter description, or (as they are usually called) bills for a new trial, have not been of late years much countenanced. In general, it has been considered that the ground for a bill to obtain a new trial after judgment in an action at law must be such as would be ground for a bill of review of a decree in a court of equity upon discovery of new matter;<sup>4</sup> and therefore where judgment has been obtained against one underwriter on a policy of insurance, a point of

<sup>1</sup> *Pincke v. Thornycroft*, 1 Bro. C. C. 289.

<sup>2</sup> See 7 Ves. 273; 2 Sch. & Lefr. 685.

<sup>3</sup> *Curtess v. Smalridge*, 1 Cas. in Chan. 43; 3 C. Rep. 17; *Robinson v. Bell*, 2 Vern. 146; *Thomas v. Gyles*, 2

Vern. 232; *Tilly v. Wharton*, 2 Vern. 378; s. c. Ib. 419; 1 Eq. Cas. Abr. 377; 378; *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424; *Hankey v. Vernon*, 2 Cox's R. 12; 2 Ves. jr. 135.

<sup>4</sup> 1 Cas. in Chan. 43.

law being adjudged on a case reserved in favor of the plaintiff at law; and afterwards in other actions on the same policy, against other underwriters, judgment was given for the defendants on the same point, the first judgment being deemed to have been clearly erroneous; a demurrer was allowed to a bill brought by the defendant in the first action for a new trial. No new matter of fact had been discovered; and if this bill had been sustained, a similar bill might have been filed whenever a court of law had pronounced an erroneous judgment which could not be reversed by a writ of error.<sup>1</sup> So if the defendant in an action at law submits to go to trial without filing a bill in equity for a discovery of evidence, and after verdict against him attempts to obtain that discovery as a ground for a new trial, the court of equity will not countenance such a proceeding when there is no fraud in the conduct of the plaintiff at law.<sup>2</sup>\*

Cases of oppression, where a man has taken advantage of the situation of another to obtain from him an unreasonable contract, have been the subjects of relief on the same ground;<sup>3</sup> and in some cases the courts of equity have rescinded improper contracts on the grounds of general policy, and to prevent a public inconvenience, as in the case of securities given

<sup>1</sup> *Gibson v. Bell*, on demurrer, 30 July, 1800, in Chan.      tion. See *Field v. Beaumont*, 2 Swanst. 204.

<sup>2</sup> *Richards v. Symes*, 2 Atk. 319; *Williams v. Lee*, 3 Atk. 223; *Manning v. Mestaer*, in Chan. 9 Dec. 1786, on cause shown against dissolving injunction. See *Bosanquett v. Dashwood*, Cas. t. Talb. 38; *Osmond v. Fitzroy*, 3 P. Wms. 131; *Cooke v. Clayworth*, 18 Ves. 12; 6 Madd. 109.

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\* A bill to set aside a verdict is not sustainable where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial, upon cross-examination, (*Taylor v. Sheppard*, 1 Y. & C. Eq. Ex. Cas. 271.)

for marriage brokerage,<sup>1</sup> or for the obtaining of public offices, or employments.<sup>2</sup>

If a bill for any of these purposes does not show a sufficient ground for a court of equity to interfere, the defendant may demur for want of matter of equity in the plaintiff's case to support the jurisdiction of the court. And the courts of equity will thus restrain and relieve against the effect of proceedings in other courts in such cases only as concern mere civil rights; and therefore if a bill is brought for relief against a proceeding at law upon a criminal prosecution, as an indictment or information, or a mandatory writ, as a writ of prohibition, a mandamus, or any writ which is mandatory and not remedial, the defendant may demur.<sup>3\*</sup>

3. The principles of law which guide the decisions of the courts of ordinary jurisdiction, and especially the courts of common law, were principally formed in times when the necessities of men were few, and their ingenuity was little exercised to supply their wants. Hence it has happened that, according to the principles of natural and universal justice, there are many rights for injuries to which the law, as administered by those courts, has provided no remedy. This is particularly the case in matters of trust and confidence, of which the ordinary courts, taking in a variety of in-

<sup>1</sup> *Smith v. Bruning*, 2 Vern. 392; 3 P. Wms. 394; *Williamson v. Gihon*, 2 Sch. & Lefr. 357. *Hannington v. Du Chatel*, 1 Bro. C. C. 124; S. C. 2 Swanst. 159, note.

<sup>2</sup> *Law v. Law*, 3 P. Wms. 391; *Whittingham v. Bourgoyne*, 3 Anstr. 900; <sup>3</sup> *Lord Montague v. Dudman*, 2 Ves. 396; 1 Eq. Cas. Abr. 131; and see 18 Ves. 220.

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\* A court of equity will, at the suit of a creditor, vacate and annul a fraudulent conveyance made by his debtor. But the creditor must have first obtained a judgment at law, creating a lien, in the case of real property. (2 Johns. Ch. R. 296.) And in the case of personal property, the creditor must have sued out execution, to bind. (4 Johns. Ch. R. 677; 4 Md. Ch. Decis. 329; *Adams' Equity*, 306, 5 Am. ed.)



stances no cognizance, and the positive law being silent on the subject, the courts of equity, considering the conscience of the party intrusted as bound to perform the trust, have interfered to compel the performance. And it has long been settled, that where trustees are desirous of acting under the direction and protection of a court of equity, they may file a bill for those purposes against the persons interested in the trust property.<sup>1</sup> And in many other cases where the positive law has been silent, and there are rights in conscience for injuries to which the ordinary courts afford no remedy, the courts of equity have also interfered; enforcing the principles of universal justice upon the ground of obligation on the conscience of the party against whom they are enforced.<sup>2</sup> To support a bill in any of these cases, it is necessary for the plaintiff to show that the subject of the suit is such upon which a court of equity will assume jurisdiction; and if he fails to do so, the defendant may demur.

4. Courts of equity in many cases will act as ancillary to the administration of justice in other courts, by removing impediments to the fair decision of a question. Thus, if an ejectment is brought to try a right to land in a court of common law, a court of equity will restrain the party in possession from setting up any title which may prevent the fair trial of the right, as a term for years, or other interest in a trustee, lessee, or mortgagee.<sup>3</sup>\* But this will not be done in

<sup>1</sup> *Leech v. Leech*, 1 Cas. in Chan. 249. And see *Fielden v. Fielden*, 1 Sim. & Stu. 255.

<sup>2</sup> It is said, 1 P. Wms. 777, that before the statute of the 3 & 4 W. & M. c. 14, courts of equity made an heir re-

sponsible to creditors for the value of assets which he had aliened.

<sup>3</sup> 6 Ves. 89; 1 Sch. & Lefr. 429; and see 13 Ves. 298; *Armitage v. Wadsworth*, 1 Madd. R. 189; *Barney v. Luckett*, 1 Sim. & Stu. 419; *Northey v. Pearce*, Ib. 420.

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\* If a bill to prevent the setting up of outstanding terms of years does

every case; for as the court proceeds upon the principle that the party in possession ought not in conscience to use an accidental advantage to protect his possession against a real right in his adversary, if there is any circumstance which meets the reasoning upon this principle, the court will not interfere. Therefore, if the possessor is a purchaser for a valuable consideration without notice of the title of the claimant, this is a title in conscience equal to that of the claimant, and the court will not restrain the possessor from using any advantage he may be able to gain to defend his possession.<sup>1</sup> It can hardly appear upon the face of a bill that the defendant is in such a situation, and therefore the benefit of this defense must generally be taken by plea; but if the case should be so stated, the defendant might demur; because the case stated would appear to be such in which a court of equity ought not to assume jurisdiction. If the matter suggested in a bill as an impediment to the determination of a question in a court of ordinary jurisdiction in fact is

<sup>1</sup> See 2 Ves. jr. 457, 458; *Maundrell v. Maundrell*, 7 Ves. 567; s. c. 10 Ves. 246.

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not state that there are such terms, but merely alleges that the defendant threatens to set up some outstanding satisfied terms of years, or some other legal estate or interest in the premises, it is demurrable. For an outstanding legal estate may be such as to make it impossible for the plaintiff to recover in ejectment; as if the legal fee was not vested in the testator, where the plaintiff claims by devise. (*Stansbury v. Arkwright*, 6 Sim. 481.) But if the bill alleges that there are some outstanding terms, which, if set up by way of defense, would defeat the ejectment, and that the defendant threatens to set up those terms, such an allegation is sufficient. (*Baker v. Harwood*, 7 Sim. 373.)

In a bill to restrain the setting up of outstanding terms in ejectment, a positive averment of an absolute and indefeasible title in the plaintiff, as a devisee, is sufficient, notwithstanding the bill only alleges that the deviser "being or claiming to be seized or otherwise well entitled," devised the estate to the plaintiff. (*Houghton v. Reynolds*, 2 Hare, 264.)

not so, the defendant may also demur; for then there is no pretense for the interference of a court of equity.

5. Pending a litigation the property in dispute is often in danger of being lost or injured, and in such cases a court of equity will interpose to preserve it, if the powers of the court in which the litigation is depending are insufficient for the purpose.\* Thus during a suit in an ecclesiastical court for administration of the effects of a person dead, a court of equity will entertain a suit for the mere preservation of the property of the deceased till the litigation is determined, although the ecclesiastical court, by granting an administration *pendente lite*, will provide for the collection of the effects.<sup>1</sup> And, pending an ejectment in a court of common law, a court of equity will restrain the tenant in possession from committing waste, by felling timber, plowing ancient meadow, or otherwise.<sup>2</sup> Against this inconvenience a remedy at the common law was in many cases provided during the pendency of a real action by the writ of estrepement;<sup>3</sup> and when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of estrepement did not apply to the case, the courts of equity, proceeding on the same principles, supplied the defect.†

But, in general, if the court in which the suit is depending can itself provide for the safety of the property, a demurrer will hold. The interference to

<sup>1</sup> King v. King, 6 Ves. 172; Richards v. Chave, 12 Ves. 462; Edmunds v. Bird, 1 Ves. & Bea. 542; Atkinson v. Henshaw, 2 Ves. & Bea. 85; Ball v. Oliver, 2 Ves. & Bea. 96; Rutherford v. Douglas, rep. 1 Sim. & Stu. 111, note; 3 Meriv. 174; Jones v. Frost, 3 Madd.

1; s. c. 1 Jac. R. 466; 6 Madd. 49, 105.

<sup>2</sup> Pulteney v. Shelton, 5 Ves. 260, note; Lathropp v. Marsh, 5 Ves. 259; and see Onslow v. —, 16 Ves. 173.

<sup>3</sup> F. N. B. 60.

\* See note \* to p. 207.

† An injunction may be granted to protect mortgaged property before the mortgage debt is due. (3 Bland's Ch. Rep. 125.)

preserve the effects of a person dead, pending a litigation in the ecclesiastical court touching the administration of those effects, scarcely forms an exception to this rule ; for the protection afforded by an administration *pendente lite* has been often a very insufficient protection ; and in the administration of personal effects the courts of equity have assumed a concurrent jurisdiction with the ecclesiastical courts, and for many purposes have a much more effectual jurisdiction, particularly for payment of creditors, and concluding all parties by the judgment of the court in the distribution of the effects, and preserving the surplus for the benefit of those who may finally appear to be entitled to it.

6. Doubts have been suggested how far a court of equity ought to interfere to prevent injury arising to property pending a suit founded on trespass. This doubt, it should seem, ought to be confined to cases of mere trespass, and where the injury done is not probably irreparable.<sup>1</sup> But when a doubtful right has been asserted in a manner productive of irreparable injury, the courts have interfered. Therefore, where the tenants of a manor, claiming a right of estovers, cut down a great quantity of growing timber of great value, their title being doubtful, the court of chancery entertained a bill at the suit of the lord of the manor to restrain this assertion of it ;<sup>2</sup> and indeed the commission of waste of every kind, as the cutting of timber, pulling down of houses, plowing of ancient pasture, working of mines, and the like, is a very frequent ground for the exercise of the jurisdiction of

<sup>1</sup> *Hanson v. Gardiner*, 7 Ves. 305 ; 10 Ves. 291 ; 17 Ves. 110, 281 ; 1 Swanst. 208, 210. See above, p. 210, note 2.      <sup>2</sup> *Stonor v. Strange*, Mich. 1767, and *Stonor v. Whiting*, Hil. 1768, in Chan. 1 Sch. & Lefr. 8.

courts of equity, by restraining the waste till the rights of the parties are determined. The courts of equity have also extended their relief to restrain the owner of a mine from working minerals in the adjoining land of another, though a mere trespass under the cover of a right.<sup>1</sup>

The courts of equity seem to have proceeded upon a similar principle in the very common cases of persons claiming copyright of printed books,\* and of patentees of alleged inventions,† in restraining the publication of the book at the suit of the owner of the copy, and the use of the supposed invention at the suit of the patentees. But in both these cases the bill usually seeks an account; in one, of the books printed, and in the other, of the profit arisen from the use of the invention; and in all the cases alluded to it is frequently, if not constantly, made a part of the prayer of the bill that the right, if disputed, and capable of trial in a court of common law, may be there tried and determined under the direction of the court of equity; the final object of the bill being a perpetual

<sup>1</sup> *Mitchell v. Dors*, 6 Ves. 147; 7 Ves. 308; *Thomas v. Oakley*, 18 Ves. 184.

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\* Where a person seeks to restrain an infringement of his copyright, it is not necessary for him to specify, either in his bill or in his affidavit, the parts of the defendant's work which have been taken from his work; but it is sufficient to allege generally that parts of the defendant's work have been pirated from the plaintiff's work; for the pirated passages are pointed out by counsel when the injunction is moved for. (*Sweet v. Maughan*, 11 Sim. 51; see *Curtis*, also *Phillips on Copyrights*.)

† In a bill to restrain the infringement of a patent, it is not necessary to set forth a full statement of the specification enrolled in respect of the letters patent. If the plaintiff by his bill refers to the specification, and alleges that he has done all that was required of him, the court on demurrer will give credit to the allegation. (*Westhead v. Keene*, 8 Law J. [N. S.] Ch. Rep. 89.)

injunction to restrain the infringement of the right claimed by the plaintiff.<sup>1</sup>\*

In all cases of waste committed on lands or tenements, the courts of equity originally proceeded by analogy to the provisions of the old common law, by which tenant by the curtesy and in dower answered only for the value of the waste done, and a custos was assigned to prevent further waste. The statute of Marlebridge, 52 Hen. III, c. 23, added a fine for the offense to full damage for the injury done; and afterwards the statute of Gloucester, 6 Edw. I, c. 5, gave treble damages, and the forfeiture of the place wasted by tenant by the curtesy, for life or for years. The forfeiture by waste, and all penalties, ought to be waived in a bill for restraining waste,<sup>2</sup> the courts of equity declining to compel a discovery which may subject a defendant to any penalty or forfeiture, and confining the relief given to compensation for the damage done, and restraining future injury. So at law the person entitled to the benefit of forfeiture for waste might waive the action for waste, and maintain an action of trover for trees felled by a tenant impeachable for waste.<sup>3</sup>

<sup>1</sup> On the subject of copyright, see *Hogg v. Kirby*, 8 Ves. 215; *Longman v. Winchester*, 16 Ves. 269; *Wilkins v. Aikin*, 17 Ves. 422; *Southey v. Sherwood*, 2 Meriv. 435; *Lord and Lady Percival v. Phipps*, 2 Ves. & Bea. 19; *Gee v. Pritchard*, 2 Swanst. 402; *Rundell v. Murray*, 1 Jac. R. 311; *Law-*

*rence v. Smith*, 1 Jac. R. 471; *Barfield v. Nicholson*, 2 Sim. & Stu. 1; on that of patents, see *Harmer v. Plane*, 14 Ves. 130; *Canham v. Jones*, 2 Ves. & Bea. 248; *Hill v. Thompson*, 3 Meriv. 622; see *Curtis on Patent Rights*.

<sup>2</sup> 1 Atk. 451.

<sup>3</sup> *Berry v. Heard*, Cro. Car. 242.

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\* Trade-marks are another subject of injunctive equity. If a person has adopted a particular device as a trade-mark, and another uses it, and thereby represents a spurious article as his, he may recover damages at law for the injury to his business, and may have an injunction in equity. (4 McLean, 516; 4 Ib. 306; 2 Sandf. S. C. R. 599; *Browne on Trade-marks*, and *Phillips on Trade-marks*.)

With respect to copyholds, the courts appear, in some instances, to have refused to restrain waste, and left the lord to his legal remedy by forfeiture.<sup>1</sup> The rights of the lord and tenant of copyholds depending on the custom of each manor, it has perhaps been thought that the lord is not entitled to that protection which is given to rights ascertained by the common law of the land, and that he has generally the remedy in his own hands. Upon a lease of land in Ireland for lives, renewable forever, the courts of equity there have declined, restraining waste not specially provided for by the terms of the lease.<sup>2</sup>

But in the case of waste the courts of equity have in many instances given remedies where the common law has provided none.<sup>3</sup> Thus in the case of coparceners<sup>4</sup> and tenants in common,<sup>5</sup> the court has interfered to prevent the destruction of the property by one coparcener, or one tenant in common, to the injury of the rest.<sup>5</sup> So where tenant for life not impeachable for waste has proceeded to destruction of a mansion-house,<sup>6</sup> or to cut down ornamental trees, or trees necessary for the protection of a mansion, or young saplings.<sup>7</sup> In these cases it should seem that the courts have proceeded on the ground that the acts done were an unconscientious use of the powers given to the particular tenant, and in some instances, perhaps, partaking of the nature of mere malicious mischief.<sup>8</sup> It has

<sup>1</sup> *Dench v. Bampton*, 4 Ves. 700. In a cause, however, of *Richards v. Noble*, before Lord Erskine, when chancellor, now reported in 3 Meriv. 673, this decision was overruled.

<sup>2</sup> *Calvert v. Gason*, 2 Sch. & Lefr. 561.

<sup>3</sup> *Beaumont and Sharp*, May 9, 1751.

<sup>4</sup> *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 Ves. 128.

<sup>5</sup> 7 Ves. 590; 16 Ves. 131.

<sup>6</sup> *Vane v. Lord Barnard*, 2 Vern. 738.

<sup>7</sup> *Abraham v. Bubb*, 2 Freem. 53; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166, and cases there cited; and see above, p. 210, note 2.

<sup>8</sup> 2 Freem. 278; *Bishop of London v. Web*, 1 P. Wms. 527.

been much doubted whether in some instances this relief has not been carried to an extent which may be found productive of great inconvenience, and perhaps injustice, if the decisions should be implicitly followed.<sup>1</sup>

Where persons were bound by covenant to keep the banks of a river in repair, and by their acts in contravention of the covenant great injury was likely to arise, a court of equity has interfered by injunction.<sup>2</sup>

In all the cases in which the interference of a court of equity is thus sought, if the bill should not clearly show the title of the plaintiff, or his right to demand the assistance of the court in his favor, or that the case is one to which the court will apply the remedy sought, the defendant may demur.

7. It has been mentioned<sup>3</sup> that where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him; and that the bill exhibited for this purpose is termed a bill of interpleader, the object of it being to compel the claimants to interplead, so that the court may adjudge to whom the property belongs, and the plaintiff may be indemnified.\* The principles upon which the courts of equity proceed in these cases are similar to those by which the courts of law are guided in the case of bailment; the courts of law compelling interpleader between persons claiming property, for the indemnity of a third person in whose hands the property is, in certain cases only; as where the property has been bailed

<sup>1</sup> See 16 Ves. 185.

<sup>2</sup> Lord Kilmorey *v.* Thackeray, cited

<sup>3</sup> Brown C. C. 65.

<sup>3</sup> See above, p. 147.

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\* See note \* to p. 207.



to the third person by both claimants, or by those under whom both make title, or where the property came to the hands of the third person by accident; and the courts of equity extending the remedy to all cases to which in conscience it ought to extend, whether any suit has been commenced by any claimant, or only a claim made.<sup>1</sup>

This remedy has been applied to the case of tenants of lands charged with annuities, and liable to distress by their landlord, and the claimants of annuities,<sup>2</sup> and to other cases of disputed titles,<sup>3</sup> in which the tenants have been permitted to pay their rents into court.<sup>4</sup>

If a bill of interpleader does not show that each of the defendants whom it seeks to compel to interplead claims a right, both the defendants may demur; one, because the bill shows no claim of right in him; the other, because the bill, showing no claim of right in the codefendant, shows no cause of interpleader.<sup>5</sup> Or if the plaintiff shows no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur.<sup>6</sup> A bill of this nature is also

<sup>1</sup> It may here be noticed, that if at the hearing the question between the defendants be ripe for decision, this court will make a decree; and that if such be not the case, it will direct an action, an issue, or a reference to a master, in order to bring the matter to a determination. See *Duke of Bolton v. Williams*, 2 Ves. jr. 138; s. c. 4 Bro. C. C. 297; *Angell v. Hadden*, 16 Ves. 202.

<sup>2</sup> *Surry and others, Tenants of Lord Waltham, against Vaux and others*, 28 Feb. 1785; *Aldridge v. Thompson*, 2 Bro. C. C. 150; *Lord Thomond's Case*, cited 9 Ves. 107; *Angell v. Hadden*, 15 Ves. 244; s. c. 16 Ves. 202.

<sup>3</sup> *Wood v. Kay and wife and others*, 19 Dec. 1786; 2 Ves. jr. 312; 16 Ves. 203, 204.

<sup>4</sup> It is however observable, that in such cases the court interferes on the

ground of privity having been created by the act of the landlord between his tenant and the other claimant. See *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 12 Ves. 383; *E. I. Comp. v. Edwards*, 18 Ves. 376.

<sup>5</sup> 1 Ves. 249.

<sup>6</sup> As, for example, if a tenant were to file such a bill against his landlord, and a person with whom he himself has no privity, but who claims by a title adverse to that of the landlord (*Dun-gey v. Angove*, 2 Ves. jr. 304; 2 Anstr. 532; *Johnson v. Atkinson*, 3 Anstr. 798); or an agent against his principal and a third person (*Nicholson v. Knowles*, 5 Madd. 47); or a debtor against his creditor become a bankrupt, and the assignees of the latter. *Harlow v. Crowley*, 1 Buck B. C. 273, and *Lowndes v. Cornford*, 18 Ves. 299; s. c. 1 Rose B. C. 180.

liable to a peculiar cause of demurrer ; for as the court will not permit such a bill to be brought in collusion with either claimant, the plaintiff, as has been already mentioned, is required to annex to his bill an affidavit that it is not exhibited in collusion with any of the parties, to induce the court to entertain jurisdiction of the suit ; and the want of that affidavit is therefore a ground of demurrer.<sup>1</sup>\* A bill of this nature generally prays an injunction to restrain the proceedings of the claimants in some other court ; and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by this bill to offer to pay the money due into court.<sup>2</sup>† If he does not do so, it is perhaps in strictness a ground of demurrer.‡

8. In many cases the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction.<sup>3</sup>||

<sup>1</sup> *Metcalf v. Harvey*, 1 Ves. 248 ; and see 2 Ves. & Bea. 410.

<sup>2</sup> *Lord Thanet v. Patterson*, 3 Barnard, 247 ; 2 Ves. jr. 108, 109. It seems that there might be a case in which a

demurrer would be prevented by the money being brought into court. See 19 Ves. 323.

<sup>3</sup> 2 Sch. & Lefr. 211.

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\* Where a bill of interpleader is filed by the officer of a company on behalf of the company, the affidavit annexed ought to state, not that the secretary, who is the mere nominal plaintiff, does not collude, but that, to the best of his knowledge and belief, the society, who are the real plaintiffs, do not collude with the defendants. (*Bignold v. Audland*, 11 Sim. 23.)

† Where a bill of interpleader is filed respecting a sum of money on which interest is payable at law, under the stat. 3 & 4 Wm. IV, c. 42, s. 8 (as in the case of a sum insured), the plaintiff ought to offer by his bill to pay the interest. (*Bignold v. Audland*, 11 Sim. 23.)

‡ A bill of interpleader is not demurrable on account of its not offering to pay the money claimed into court. . But it is said that the plaintiff must bring it in before he takes any step in the cause. (*Meux v. Bell*, 6 Sim. 175.)

|| See note \* to p. 207.

Thus, actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered; and after repeated trials, and satisfactory determinations of questions, have granted perpetual injunctions to restrain further litigation,<sup>1</sup> and thus have in some degree put that restraint upon litigation which is the policy of the common law in the case of real actions.<sup>2</sup>

Upon the same principle<sup>3</sup> the courts of equity seem to have interfered in cases as well of private as of public nuisance;\* in the first, at the suit of the party injured;<sup>4</sup> in the second, at the suit of the attorney general;<sup>5</sup> restraining the exercise of the nuisance where the proceedings at law are ineffectual for the purpose, and preventing the creation of a nuisance where irreparable injury to individuals or great public injury would ensue.<sup>6</sup> In the case of a private nuisance it seems necessary that a judgment at law, ascertaining the rights of the parties, should have been previously obtained.<sup>7</sup> On informations by the attorney general on behalf of the crown, the Court of Exchequer has proceeded to the abatement of nuisances injurious to the royal prerogative, such as nuisances in harbors, or even trespasses on the public rights of the crown

<sup>1</sup> *Earl of Bath v. Sherwin*, Prec. in Chan. 261; s. c. 4 Brown P. C. 373, Toml. ed.; *Leighton v. Leighton*, 1 P. Wms. 671; s. c. 4 Bro. P. C. 378, Toml. ed. And see *Anon. Gilb. Eq. R.* 183; s. c. 2 Eq. Abr. 172; *Barefoot v. Fry*, Bunb. 158; 2 Sch. & Lefr. 211.

<sup>2</sup> *Strange*, 404.

<sup>3</sup> See *Dick*. 164; 16 Ves. 342; 19 Ves. 622.

<sup>4</sup> See *Ryder v. Bentham*, 1 Ves. 543; Att. Gen. v. Nicholl, 16 Ves. 338; s. c. 3 Meriv. 687.

<sup>5</sup> See *Anon.* 3 Atk. 750; s. c. named *Baines v. Baker*, Ambl. 158; Att. Gen. v. Cleaver, 18 Ves. 211.

<sup>6</sup> 16 Ves. 342.

<sup>7</sup> 19 Ves. 622; *Chalk v. Wyatt*, 3 Meriv. 688; *Wynstanley v. Lee*, 2 Swanst. 333.

without any nuisance.<sup>1</sup> If a trespass is made on the soil of the crown, whether reserved for the private use of the sovereign or for public purposes, and the trespass does not produce a public injury, the jurisdiction may be founded on the right of the crown to have the land arrented, and the profit accounted for as part of the royal revenue, in the nature of an assart; and if the trespass produces, or may in its consequences produce public injury, the crown is entitled to the most effectual means of preventing the injury.<sup>2</sup>

Courts of equity will also prevent multiplicity of suits; and the cases in which it is attempted and the means used for that purpose are various.\* With this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right.<sup>3</sup> Thus, where a right of fishery was claimed by a corporation throughout the course of a considerable river, and was opposed by the lords of manors and owners of land adjoining, a bill was entertained to establish the right against the several opponents, and a demurrer was overruled.<sup>4</sup>

As the object of such bills is to prevent multiplicity of suits by determining the rights of the parties upon issues directed by the court, if necessary for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in ques-

<sup>1</sup> Att. Gen. *v.* Forbes, Ex. Trin. 1795; Hale de Jure Maris, p. 1, c. 4, p. 18; Churchman *v.* Tunstal, Hardr. 162; Att. Gen. *v.* Richards, Anstr. 603.

<sup>2</sup> 18 Ves. 218.

<sup>3</sup> 2 Atk. 484; 11 Ves. 444; Corpo-

ration of Carlisle *v.* Wilson, 13 Ves. 276; Duke of Norfolk *v.* Myers, 4 Madd. 83; 1 Jac. & W. 369.

<sup>4</sup> Mayor of York *v.* Pilkington, 1 Atk. 282.

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\* See note \* to p. 207, *supra*.

tion between the plaintiff and defendant in it, such a bill can scarcely be sustained where a right is disputed between two persons only, until the right has been tried and decided upon at law.<sup>1</sup> Indeed, in most cases it is held that the plaintiff ought to establish his right by a determination of a court of law in his favor before he files his bill in equity ;<sup>2</sup> and if he has not so done, and the right he claims has not the sanction of long possession,<sup>3</sup> and he has any means of trying the matter at law,<sup>4</sup> a demurrer will hold. If he has not been actually interrupted or dispossessed, so that he has had no opportunity of trying his right, he may bring a bill to establish it, though he has not previously recovered in affirmance of it at law, and in such a case a demurrer has been overruled.<sup>5</sup>

It is not necessary to establish a right at law before filing a bill where the right appears on record, as under letters patent for a new invention, in which case a demurrer to a bill for an injunction to restrain an infringement of the patent right has been overruled.<sup>6</sup> So in the cases of bills brought by authors or their assignees to restrain the sale of books where the right which is the foundation of the bill is grounded on an act of parliament.<sup>7</sup> And where a right appeared on record by a former decree of the court, it was determined that it was not necessary to establish it at law before filing a bill.<sup>8</sup> Where a right

<sup>1</sup> Lord Teynham *v.* Herbert, 2 Atk. 483.

<sup>2</sup> 1 Atk. 284; Anon. 2 Ves. 414; 2 Sch. & Lefr. 208; 11 Ves. 444; 1 Jac. & W. 369.

<sup>3</sup> Bush *v.* Western, Prec. in Chan. 530.

<sup>4</sup> Whitchurch *v.* Hide, 2 Atk. 391; Wells *v.* Smeaton, in Chan. 27 May, 1784.

<sup>5</sup> 1 Atk. 284. And see Duke of Dorset *v.* Girdler, Prec. in Chan. 531. But see Welby *v.* Duke of Rutland, 2 Bro. P. C. 39, Toml. ed.; 2 Sch. & Lefr. 209.

<sup>6</sup> Horton and Maltby, in Chan. 23 July, 1783; 3 Meriv. 624.

<sup>7</sup> 1 Ves. 476.

<sup>8</sup> Ibid.

*prima facie* and of common right is vested in the crown, it will receive the same protection,<sup>1</sup> and this principle may be applied to some of the cases mentioned in a preceding page.

A court of equity will thus protect private rights, or rights of those who may be comprehended under one common capacity, as the inhabitants of a parish, or the tenants of a manor, which has been frequently done in bills to establish parochial customs of tithing disputed by the tithe-owner, and more rarely in bills to establish the customs of manors disputed by the lord;<sup>2</sup> but will not establish or decree a perpetual injunction for the enjoyment of a right in contradiction to a public right, as a right to a highway or a common navigable river, for that would be to enjoin all the people of England,<sup>3</sup> although it will restrain a public nuisance at the suit of the attorney general.

A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill *quia timet*,<sup>4</sup> in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading.<sup>4</sup> Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harm-

<sup>1</sup> See 6 Ves. 713; *Grierson v. Eyre*, 9 Ves. 341; 13 Ves. 508.

<sup>2</sup> *New Elme Hospital v. Andover*, 1 Vern. 266; *Baker v. Rogers*, Sel. Cas. in Chan. 74; *Cowper v. Clerk*, 3 P. Wms. 155; 2 Eq. Cas. Abr. 172.

<sup>3</sup> Lord Hardwicke, in Lord Fauconberg and Pierse, 11th of May, 1753; 2 Eq. Cas. Abr. 171; Ambl. 210.

<sup>4</sup> Co. Litt. 100, a.

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\* See note \* to p. 207.

less, a bill may be filed to relieve the covenantee under similar circumstances.<sup>1</sup>

9. To administer to the ends of justice without pronouncing any judgment which may affect any rights, the courts of equity in many cases compel a discovery which may enable other courts to decide on the subject. The cases in which this jurisdiction is exercised will be considered in treating of demurrers to discovery only.

10. When the testimony of witnesses is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation, a court of equity will lend its aid to preserve and perpetuate the testimony;<sup>2</sup> and as the courts of common law cannot generally examine witnesses, except *viva voce* upon the trial of an action, the courts of equity will supply this defect by taking and preserving the testimony of witnesses going abroad, or resident out of the kingdom,<sup>3</sup> which may be afterwards used in a court of common law. As the object of this jurisdiction is to assist other courts, and by preserving evidence to prevent future litigation, there are few cases in which the court will decline to exercise it. A demurrer to a bill seeking the benefit of it will therefore seldom lie;<sup>4</sup> and in a case where the court was of opinion that the

<sup>1</sup> Lord Ranelagh *v.* Hayes, 1 Vern. 189, 190; and on the general subject, see also 1 Ves. 283; Flight *v.* Cook, 2 Ves. 619; Green *v.* Pigot, 1 Bro. C. C. 103; Brown *v.* Dudbridge, 2 Bro. C. C. 321.

<sup>2</sup> See above, p. 150, note 2.

<sup>3</sup> As to the examination of witnesses resident abroad, see Cock *v.* Donovan, 3 Ves. & Bea. 76; Bowden *v.* Hodge, 2 Swanst. 258; Cheminant *v.* De la Cour,

1 Madd. 208; Devis *v.* Turnbull, 6 Madd. 232; Baskett *v.* Toosey, 6 Madd. 261; Angell *v.* Angell, 1 Sim. & Stu. 83; Mendizabel *v.* Machado, 2 Sim. & Stu. 485.

<sup>4</sup> 1 Atk. 451, 571; 1 P. Wms. 117; Tirrell *v.* Co. 1 Rol. Abr. 383; Mendez *v.* Barnard, 16 May, 1735, on demurrer; Lord Dursley *v.* Fitzhardinge, 6 Ves. jr. 251 to 266. See, however, The Earl of Belfast *v.* Chichester, 2 Jac. & W. 439.

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\* See note \* to p. 207.

defendant might demur both to the discovery sought and the relief prayed by a bill, it was held that to so much of the bill as sought to perpetuate the testimony of witnesses the defendant could not demur.<sup>1</sup> But if the case made by the bill appears to be such on which the jurisdiction of the court does not arise, as if the matter to which the required testimony is alleged to relate can be immediately investigated in a court of law, and the witnesses are resident in England, a demurrer will hold.<sup>2</sup> Still, however, where from circumstances, as the age or infirmity of witnesses, or their intention of leaving the kingdom, it has been probable that the plaintiff would lose the benefit of their testimony, though he should proceed with due diligence at law, the court has sustained a bill for their examination;<sup>3</sup> and to avoid a demurrer in this case, it seems necessary to annex to the bill an affidavit of the circumstance by means of which the testimony may probably be lost.<sup>4</sup> A bill for the examination of a single witness has been permitted where his evidence was of the utmost importance, and he was the only witness to the point, apparently upon the single ground that, as he was the only witness, there was danger of losing all evidence of the matter before it could be given in a court of law; but in this case an affidavit of the witness was annexed to the bill.<sup>5</sup> The principle on which it is required in these cases to annex to the bill an affidavit of the circumstances which render

<sup>1</sup> Earl of Suffolk *v.* Green, 1 Atk. 450. See Thorpe *v.* Macaulay, 5 Madd. 218; Shakell *v.* Macauley, 2 Sim. & Stu. 79.

<sup>2</sup> Lord North *v.* Lord Gray, Dick. 14; 1 Sim. & Stu. 89.

<sup>3</sup> As to the examination of witnesses under such circumstances, *de bene esse*, see Shirley *v.* Earl Ferrers, 3 P. Wms. 77; Palmer *v.* Lord Aylesbury, 15 Ves. 176; Andrews *v.* Palmer, 1 Ves. & Bea.

21; Corbett *v.* Corbett, 1 Ves. & Bea. 335; Atkins *v.* Palmer, 5 Madd. 19; Dew *v.* Clarke, 1 Sim. & Stu. 108.

<sup>4</sup> Philips *v.* Carew, 1 P. Wms. 117; 1 Ves. & Bea. 23.

<sup>5</sup> Shirley *v.* Earl Ferrers, 4th Seal after Trin. Term, 1730, MS. N; 3 P. Wms. 77; M. 1730, 8 Ves. 32. See above, p. 150, note 3.



the examination of witnesses proper in a court of equity, though the matter is capable of being made immediately the subject of a suit at law, seems to be the same as that on which the practice of annexing an affidavit of the loss or want of an instrument to a bill seeking to obtain in a court of equity the mere legal effect of the instrument is founded, namely, that the bill tends to alter the ordinary course of the administration of justice, which ought not to be permitted upon the bare allegation of a plaintiff in his bill.

II. It has been before noticed, that the establishment of courts of equity has obtained throughout the whole system of our judicial polity; and that most of the inferior branches of that system have their peculiar courts of equity, the Court of Chancery assuming a general jurisdiction in cases not within the bounds, or beyond the powers of inferior jurisdictions. The principal of the inferior jurisdictions in England are those of the counties palatine of Chester, Lancaster, and Durham, the courts of great session in Wales, the courts of the two universities of Oxford and Cambridge, the courts of the city of London and of the cinque-ports.<sup>1</sup>\* These are necessarily bounded by the locality either of the subject of the suit or of the residence of the parties litigant. Where those circumstances occur which give them jurisdiction, they have exclusive jurisdiction in matters of equity as well as matters of law; and they have their own peculiar courts of appeal, the Court of Chancery assuming no

<sup>1</sup> The Court of Exchequer, as a court of equity, does not seem to give to any person the privilege of being sued there.

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\* See notes † and ‡, p. 103.

jurisdiction of that nature, though it will in some cases remove a suit before the decision into the chancery by writ of certiorari. When therefore it appears on the face of a bill that another court of equity has the proper jurisdiction, either immediately, or by way of appeal, the defendant may demur to the jurisdiction of the Court of Chancery. Thus to a bill of appeal and review of a decree in the court of the county palatine of Lancaster, the defendant demurred, because on the face of the bill it was apparent that the Court of Chancery had no jurisdiction; and the demurrer was allowed.<sup>1</sup> But demurrers of this kind are very rare; for the want of jurisdiction can hardly appear upon the face of the bill, at least so conclusively as is necessary<sup>2</sup> to deprive the chancery, a court of general jurisdiction, of cognizance of the suit; and a demurrer for want of jurisdiction founded on locality of the subject of the suit, which alone can exclude the jurisdiction of the chancery in a matter cognizable in a court of equity, has even been treated as informal and improper.<sup>3</sup> This, however, can only be considered as referring to cases where *circumstances may* give the chancery jurisdiction, and not to cases where *no circumstance can* have that effect. Thus the counties palatine having their peculiar and exclusive courts of equity under certain circumstances, which will be more fully considered in another place,<sup>4</sup> the Court of Chancery will not interfere when all those circumstances attend the case, and they are shown to the court; though if those circumstances are not shown, or if they are not shown in proper time, and the defendant, instead of resting upon them and declining the jurisdiction, enters into the

<sup>1</sup> *Jennet v. Bishopp*, 1 Vern. 184.

<sup>2</sup> See 1 Ves. 203, 204.

<sup>3</sup> See *Roberdeau v. Rous*, 1 Atk. 543.

<sup>4</sup> See pleas to the jurisdiction of the Court of Chancery.

defense at large, the court, having general jurisdiction, will exercise it. But where *no circumstance can* give the chancery jurisdiction, as in the case alluded to of a bill of appeal and review of a decree in a county palatine, it will not entertain the suit, even though the defendant does not object to its deciding on the subject.

III. If a plaintiff is not entitled to sue by reason of any personal disability,<sup>1</sup> which is apparent in the bill, the defendant may demur. Therefore, if an infant, or a married woman, an idiot or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur; but if the incapacity does not appear upon the face of the bill, the defendant must take advantage of it by plea. This objection extends to the whole bill, and advantage may be taken of it as well in the case of a bill for discovery merely as in the case of a bill for relief. For the defendant in a bill for a discovery merely, being always entitled to costs after a full answer as a matter of course, would be materially injured by being compelled to answer a bill exhibited by persons whose property is not in their own disposal, and who are therefore incapable of paying the costs.

IV. Interest in the subject of the suit,\* or a right

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<sup>1</sup> See *Wartnaby v. Wartnaby*, 1 Jac. R. 377.

\* If one or some of the coplaintiffs be not interested in the subject of the suit, the bill is demurrable (*Page v. Townsend*, 5 Sim. 395; *Delondre v. Shaw*, 2 Sim. 237): as in the case of a mere agent concerned with the subject-matter of the suit (*The King of Spain v. Machado*, 4 Russ. 225); or a trustee under a deed which never had any operation as a valid instrument. (*Cuff v. Platel*, 4 Russ. 242.)

So where an indorsee of a bill of exchange brings an action against the acceptor (a banker) who accepted the bill as agent for another (a customer),

in the thing demanded, and proper title to institute a suit concerning it,\* are essentially necessary to sus-

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and refuses to pay on the ground that the indorsee is not the person authorized to receive the money by the party to whose order it was made payable, and the acceptor files a bill of discovery in aid of his defense; such a bill is demurrable, if the party for whom he accepted the bill is joined with him as a coplaintiff: because there is no contract between the indorsee and the party for whom the acceptor has accepted the bill: the indorsee has nothing whatever to do with that party, although he, and not the acceptor, is the person substantially interested in the result of the action.

And if, in such a suit, the party to whose order the money was payable is an officer of the government of a foreign country, and the money forms part of a loan negotiated by the government of that country, and the government is changed, no question can be raised respecting the right of the new government, or any one claiming through it, to receive the money negotiated by the former government: for, in such a suit, the question, who is beneficially entitled to the money, cannot be discussed. (*Glyn v. Soares*, 3 M. & K. 450.) In this case the treasurer of the royal treasury of Portugal was the officer to whose order the money was payable, as part of a loan negotiated by Don Miguel, who was shortly afterward succeeded by Donna Maria.

Great evil might be occasioned if persons having no interest were allowed to be made coplaintiffs with others having an interest in the subject of the suit. For instance, by an artful selection of coplaintiffs having no interest, a coplaintiff having an interest might thereby insure such a series of abatements, by a succession of deaths and marriages, as would enable him to oppress the defendants, and prevent the suit from ever reaching a stage in which the expense might be made to recoil upon himself. And if a defendant had occasion to file a cross-bill, he would be obliged to make the other coplaintiffs defendants thereto. Again, a plaintiff out of the jurisdiction of the court might escape from giving security for costs, by joining, as a coplaintiff, a person having no interest, but residing within the jurisdiction. And all the plaintiffs who have an interest in the suit might die and leave those who have no interest to carry on the suit. (Arg. of counsel in *The King of Spain v. Machado*, 4 Russ. 225.)

Where a bill is filed against a trustee for a breach of trust, but two of the coplaintiffs induced the trustee to commit such breach of trust, and gave him an indemnity in respect thereof, still, if the other coplaintiffs are infants, and the objection is not taken until the hearing, it will be overruled. (*Wilkinson v. Parry*, 4 Russ. 272.)

\* An uncertificated bankrupt cannot call on his assignees for a general

tain a bill; and if they are not fully shown by the bill itself, the defendant may demur.<sup>1</sup> Therefore, where a Protestant next of kin claimed a rent charge settled on a Papist on her marriage, a demurrer was allowed,<sup>2</sup> for the plaintiff had evidently no right to the thing which he demanded by his bill, the Papist being incapable of taking by purchase,\* and the grant of the rent charge being therefore utterly void. And where a plaintiff claimed under a will, and it was apparent, upon the construction of the will, that he had no title, a demurrer was allowed.<sup>3</sup> But in this case it was said, that if upon arguing the demurrer, the court had not been satisfied, and had been therefore desirous that the matter should be more fully debated at a deliberate hearing,<sup>4</sup> the demurrer would have been overruled, without

<sup>1</sup> See 2 Sch. & Lefr. 638; *Darthez v. Winter*, 2 Sim. & Stu. 536.

<sup>2</sup> See *Michaux v. Grove*, 2 Atk. 210.

<sup>3</sup> *Brownsword v. Edwards*, 2 Ves. 243. See also *Beech v. Crull*, Prec. in Chan. 589; *Parker v. Fearnley*, 2 Sim. & Stu. 592.

<sup>4</sup> Perhaps this declaration fell from

the court rather incautiously, as a dry question upon the construction of a will may be as deliberately determined upon argument of a demurrer as at the hearing of a cause in the ordinary course; and the difference in expense to the parties may be considerable. See above, p. 204, note 1.

account of all their transactions, which he might have by applying to the court of bankruptcy. (*Tarleton v. Hornby*, 1 Y. & C. Eq. Ex. 172.)

But if the assignees of a bankrupt fraudulently and collusively sell his estate while he is proceeding to get his commission superseded, he may file a bill against them and the purchaser to set aside the sale, on the ground of fraud and collusion, if the purchaser has not come in under the commission, so that the court of review has no jurisdiction over him, and if the bankrupt has settled with all his creditors, and they have consented to the commission being superseded. (*Lautour v. Holcombe*, 8 Sim. 76.)

And a bill by an insolvent to set aside an assignment by his assignee of his interest under a will, on the ground of a special case of collusion between his assignees and the executors, is not demurrable. (*Burton v. Jayne*, 7 Sim. 24.) The counsel for the insolvent, in this case, urged that the collusion, and the fact that the Insolvent Debtors' Court had no power to set aside deeds, were sufficient to maintain the bill.

\* This disability was abolished by the stat. 10 Geo. IV, c. 7, s. 23.

prejudice to the defendant's insisting on the same matter by way of answer,<sup>1</sup> which indeed it should seem may in all cases be done without the special declaration of the court, that the overruling of the demurrer shall be without prejudice.

Though the plaintiff in a bill may have an interest in the subject, yet if he has not a proper title to institute a suit concerning it, a demurrer will hold.<sup>2</sup> \* Therefore, where persons who had obtained letters of administration of the estate of an intestate in a foreign court, on that ground filed a bill seeking an account of the estate, a demurrer was allowed,<sup>3</sup> because the plaintiffs did not show by their bill a complete title to institute a suit concerning the subject; for though they might have a right to administration in the

<sup>1</sup> 2 Ves. 247.

<sup>2</sup> It seems the plaintiff must distinctly show a title in equity; for where one stated a title either at law or in equity,

a demurrer was allowed. *Edwards v. Edwards*, 1 Jac. R. 335.

<sup>3</sup> *Tourton v. Flowers*, 3 P. Wms. 369.

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\* See note \*, p. 246. The clause in the insolvent debtors' act (1 Geo. IV, c. 119, s. 11), requiring the consent of the major part in value of the creditors to the institution of a suit, was inserted for the benefit of the creditors alone; so that the want of such consent cannot be urged as an objection by a defendant in a suit by the assignees. (*Piercy v. Roberts*, 1 M. & K. 4.) And the same is the case with regard to suits by the assignees of bankrupts. (*Gerothwohl v. Cochrane*, 5 Law J. [N. S.] 47, M. R.)

Where a person files a bill against the directors of an unincorporated joint stock company, in respect of a fraud committed by them on the shareholders; and by the rules of the company, as stated in the bill itself, no transfer of shares is to be valid, unless the purchaser shall have been approved of by a board of directors, and shall have executed a proper instrument binding himself to the observance of the regulations of the company; and the plaintiff in such bill alleges that he purchased and is the holder of shares, but he does not set forth his title as purchaser, or state that he had complied with the condition precedent above mentioned; the bill is demurrable on that account. (*Walburn v. Ingilby*, 1 M. & K. 61.)

proper ecclesiastical court in England, and might, therefore, really have an interest in the thing demanded by their bill, yet, not showing that they had obtained such administration, they did not show a complete title to institute their suit.\* And where an executor does not appear by his bill to have proved the will of his testator, or appears to have proved it in an improper<sup>1</sup> or insufficient<sup>2</sup> court, as he does not show a complete title to sue as executor, a demurrer will hold.

Want of interest in the subject of a suit, or of a title to institute it, are objections to a bill seeking any kind of relief, or filed for the purpose of discovery merely. Thus, though there are few cases in which a man is not entitled to perpetuate the testimony of witnesses, yet if upon the face of the bill the plaintiff appears to have no certain right to or interest in the matter to which he craves leave to examine, in present or in future,<sup>3</sup> a demurrer will hold. Therefore, where a person claiming as devisee in the will of a person living, but a lunatic, brought a bill to perpetuate the testimony of witnesses to the will against the presumptive heir at law;<sup>4</sup> and where persons who would

<sup>1</sup> 3 P. Wms. 371.

<sup>2</sup> Comber's Case, 1 P. Wms. 766.

<sup>3</sup> Smith v. Att. Gen. in Chan. Mich. 1777; 6 Ves. 260; Allan v. Allan, 15 Ves. 130.

<sup>4</sup> Sackvill v. Ayleworth, 1 Vern. 105; 1 Eq. Cas. Abr. 234; Smith v. Watson, in Chan. 20 June, 1760; 2 Prax. Alm. Cur. Canc. 500, where there is the form of a demurrer.

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\* Although a prerogative administration must be obtained before money can be paid out of court, and in *Young v. Elworthy* (1 M. & K. 215), Sir John Leach held that it was necessary to produce a prerogative administration before the decree can be drawn up; yet a suit may be commenced without such an administration, and cannot be stopped by demurrer on account of that circumstance. (*Metcalf v. Metcalf*, 1 Keen, 74.)

have been entitled to the personal estate of a lunatic if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a bill, in the lifetime of the lunatic, to perpetuate the testimony of witnesses to his legitimacy, against the attorney general as supporting the rights of the crown,<sup>1</sup> demurrers were allowed. For the parties in these cases had no interest which could be the subject of a suit; they sustained no character under which they could afterwards use the depositions,<sup>2</sup> and therefore the depositions, if taken, would have been wholly nugatory.

- So in every case where the plaintiff in a bill shows only the probability of a future title upon an event which may never happen, he has no right to institute any suit concerning it; and a demurrer will hold to any kind of bill on that ground, which will extend to any discovery as well as to relief.<sup>3</sup>

If the claim of the plaintiff is of a matter in itself unlawful, as of money promised to a counsellor at law for advice and pains in carrying on a suit;<sup>4</sup> or of money bequeathed by a will to purchase a dukedom;<sup>5</sup> the defendant may demur to the bill, for the plaintiff not having a lawful claim, has no title to sue in a court of justice.

There are grounds of demurrer to a bill for a discovery merely as well as to a bill for relief. But if a plaintiff shows a complete title, though a litigated one, or one that may be litigated, as that of an administration, where a suit is depending to revoke the adminis-

<sup>1</sup> *Smith v. Att. Gen. in Chan. Mich.* 1777; 6 Ves. 256, 260; 15 Ves. 133, 136.

<sup>2</sup> See 2 *Prax. Alm. Cur. Canc.* 501; and see *The Earl of Belfast v. Chichester*, 2 Jac. & W. 439.

<sup>3</sup> *Sackvill v. Ayleworth*, 1 Vern. 105;

1 *Eq. Cas. Abr.* 234; *Smith v. Att. Gen. Mich.* 1777.

<sup>4</sup> *Penrice v. Parker*, Rep. temp. Finch, 75; and see *Moor v. Rowe*, 1 Rep. in Chan. 38; 2 Atk. 332.

<sup>5</sup> *Earl of Kingston v. Lady Pierrepont*, 1 Vern. 5.



tration;<sup>1</sup> or of an administrator where there may be another personal representative;<sup>2</sup> a demurrer will not hold, at least to discovery. For in the first case, till the litigation is determined the plaintiff's title is good; and in the second case, the court will not consider the ecclesiastical court as having done wrong. And where a doubtful title only is shown, it is necessarily sufficient to support a bill seeking the assistance of a court to preserve property in dispute pending a litigation. Therefore where a suit was pending in an ecclesiastical court touching the representation to a person deceased, a demurrer of one of the parties to that suit, who had possessed the personal estate of the deceased, to a bill for an account filed by the other party was overruled.<sup>3</sup> The ground of this decision seems to have been the deficient powers of the ecclesiastical court for securing the effects whilst the suit there was depending; and the doubt as to the title of the parties was the very ground of the application to the court.

V. A plaintiff may have an interest in the subject of his suit, and a right to institute a suit concerning it, and yet may have no right to call on a defendant to answer his demand. This may be for want of privity between the plaintiff and defendant. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied to answer his demands in a due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy.<sup>4</sup> For there

<sup>1</sup> Wright *v.* Blicke, *Ib.* 106.

<sup>2</sup> 3 P. Wms. 370.

<sup>3</sup> Phipps *v.* Steward, 1 Atk. 286. And see Andrews *v.* Powys, 2 Brown P. C. 504, Toml. ed. See also Wills *v.* Rich, 2 Atk. 285; and Morgan *v.* Har-

ris, 31 Oct. 1786. Demurrer overruled, 2 Bro. C. C. 121.

<sup>4</sup> Bickly *v.* Dorrington, 10 March, 1736, Rolls, 12 Nov. 1737; Lord Chan. on appeal, cited Barnard, 32; and 6 Ves. 749; Monk *v.* Pomfret, cited *Ib.*;

is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator; unless by collusion between the representative and the debtors, or other collateral circumstance, a distinct ground is given for a bill for the legatee against the debtors.<sup>1</sup> So a bill filed by the creditors of a person who was one of the residuary legatees of a testator, against the executors of the testator, the other residuary legatees, and the executrix of their debtor, was dismissed.<sup>2\*</sup>

But where an agent has been employed, his principal has in many cases a right to a discovery of his transactions, and to demand the property with which he has been intrusted, or the value of it, against those with whom the agent has had dealings; and therefore, where a merchant, who had employed a factor to sell his goods, filed a bill against the persons to whom the goods had been sold, for an account, and to be paid the money for which the goods had been sold, and which had not been paid to the factor, a demurrer was overruled.<sup>3</sup> So where a merchant acting upon a commission *del credere* became bankrupt, having sold goods of his principals for which he had not paid them, and shortly before his bankruptcy drew bills on the vendees, which he delivered to some of his creditors

*Alsager v. Rowley*, 6 Ves. 748, and the cases there cited and referred to; 9 Ves. 86. 624. And see *Utterson v. Mair*, Vernon and others, on demurrer, 10 April, 1793, 2 Ves. jr. 95; s. c. 4 Bro. C. C. 270.

<sup>1</sup> 3 Madd. 159.

<sup>2</sup> *Elmsley v. M'Aulay*, 3 Bro. C. C.

<sup>3</sup> *Lisset v. Reave*, 2 Atk. 394.

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\* Where one of two executors was a partner with the testator, the residuary legatees may sustain a bill against the executors for an account of the partnership transactions, although collusion between them is neither charged nor proved; for the rule that the legatee cannot sue a debtor to the estate does not apply to a coexecutor who is a debtor to the estate. (*Cropper v. Knapman*, 2 Y. & C. Eq. Ex. 338.)

to discharge their demands, they knowing his insolvency, a suit by the principals was maintained against the persons who had received the bills for an account and payment of the produce. But the book-keeper of the bankrupt having been made a party, as one of the persons to whom bills had been so delivered, and having denied that fact by his answer, he was not compelled to answer to the rest of the bill, which, independent of that fact, was, as to him; a mere bill for discovery of evidence.<sup>1</sup>

VI. The plaintiff must by his bill show some claim of interest in the defendant in the subject of the suit,<sup>2</sup> \* which can make him liable to the plaintiff's demands, or the defendant may demur.<sup>3</sup> Therefore, if a bill is filed to have the benefit of or to impeach an award, and the arbitrators are made parties, they may demur to the whole bill, as well to discovery as relief;<sup>4</sup> for the plaintiff can have no decree against them, nor can he read their answer against the other defendants. In-

<sup>1</sup> *Neuman v. Godfrey*, 2 Bro. C. C. 332; 2 Ves. jr. 457. See *Att. Gen. v. Skinners' Comp.* 5 Madd. 173, particularly at p. 194. But see *Cookson v. Ellison*, 2 Bro. C. C. 252, and the other subsequent cases on the necessity of answering fully. See below, ch. 2, s. 2, pt. 3.

<sup>2</sup> See *Dowlin v. Macdougall*, 1 Sim. & Stu. 367.

<sup>3</sup> 2 Eq. Cas. Abr. 78. There are, however, instances in which persons not interested in the subject of dispute, may by their conduct so involve themselves in the transaction relating to it, that they may be held liable to costs; and under such circumstances it seems they cannot demur to the bill, if the

fraudulent or improper conduct be charged, and the costs be prayed against them. See 7 Ves. 288; 14 Ves. 252; *Le Texier v. Margravine of Anspach*, 15 Ves. 159; *Bowles v. Stewart*, 1 Sch. & Lefr. 209; *Ib.* 227; 1 Meriv. 123. And this observation of course applies more strongly where the parties may be interested, but cannot otherwise be made defendants for want of privity. See 3 Barnard, 32; *Doran v. Simpson*, 4 Ves. 651; 6 Ves. 750; 9 Ves. 86; *Salvidge v. Hyde*, 5 Madd. 138; s. c. 1 Jac. R. 151.

<sup>4</sup> *Steward v. E. I. Comp.* 2 Vern. 280. See 14 Ves. 254; *Goodman v. Sayers*, 2 Jac. & W. 249.

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\* A mere allegation that a defendant "claims an interest" in the subject-matter, without showing how or why he so claims, is not sufficient to avoid a demurrer on the ground of a want of interest. (*Plumbe v. Plumbe*, 4 Y. & C. 345.)

deed, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the court has gone so far as to order them to pay the costs;<sup>1</sup> and probably, therefore, in such a case a demurrer to the bill would not have been allowed. A bankrupt made party to a bill against his assignees touching his estate may demur to the relief, all his interest being transferred to his assignees;<sup>2</sup> but it seems to have been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees; and otherwise the bankruptcy might entirely defeat justice.<sup>3</sup> Upon the same principle it seems also to have been considered, that where a person having had an interest in the subject of a bill has assigned that interest, he may yet be compelled to answer with respect to his own acts before the assignment.

It is difficult to draw a precise line between the cases in which a person having no interest may be called upon to answer for his own acts, and those in which he may demur because he has no interest in the question. Thus, where a creditor who had obtained execution against the effects of his debtor filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the

<sup>1</sup> *Lingood v. Croucher*, 2 Atk. 395; *Chicot v. Lequesne*, 2 Ves. 315; and the case of *Ward v. Periam*, cited *Ib.* 316; 1 Turn. R. 131, note; *Lord Lonsdale v. Littledale*, 2 Ves. jr. 451; 14 Ves. 252.

<sup>2</sup> *Whitworth v. Davis*, 1 Ves. & Bea. 545; *S. C.* 2 Rose B. C. 116; *Bailey v.*

*Vincent*, 5 Madd. 48; *Lloyd v. Lander*, 5 Madd. 282; but, it seems, that if fraud were charged and costs were prayed against him, he could not demur, *Ib.* and 15 Ves. 164. See also *King v. Martin*, 2 Ves. jr. 641.

<sup>3</sup> Upon this passage see 1 Ves. & Bea. 548, 549, 550.

commission was a contrivance to defeat the plaintiff's execution, and that the debtor having by permission of the plaintiff possessed part of the goods taken in execution for the purpose of sale, and instead of paying the produce to the plaintiff had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest, and might be examined as a witness, was overruled, and the decision affirmed on rehearing.<sup>1</sup> A difference has also been taken where a person concerned in a transaction impeached on the ground of fraud has been made party to a bill for discovery merely;<sup>2</sup> or as having the custody of an instrument for the mutual benefit of others.<sup>3</sup>

To prevent a demurrer a bill must in many cases not only show that the defendant has an interest in the subject, but that he is liable to the plaintiff's demands.<sup>4</sup> As where a bill was brought upon a ground of equity by the obligee in a bond, against the heir of the obligor, alleging that the heir having assets by descent ought to satisfy the bond; because the bill did not expressly allege that the heir was bound in the bond, although it did allege that the heir ought to pay the debt, a demurrer was allowed.<sup>5</sup> So where a bill was brought by a lessor against an assignee touching a breach of covenant in a lease, and the covenant, as stated in the bill, appeared to be collateral, and not running with the land, did not therefore bind assigns, and was not stated by the bill expressly to bind assigns, the assignee demurred, and the demurrer was allowed.<sup>6</sup>

<sup>1</sup> *King v. Martin and others*, 25 July, 1795, rep. 2 Ves. jr. 641.

<sup>2</sup> *Cotton v. Luttrell*, Trin. 1738; *Bennet v. Vade*, 2 Atk. 324. See above, p. 253, note 3. See also *Bridgman v. Green*, 2 Ves. 627, 629, as to the evidence of a person charged as particeps

criminis, in support of a transaction impeached as fraudulent.

<sup>3</sup> 3 Atk. 701.

<sup>4</sup> See *Ryves v. Ryves*, 3 Ves. 343.

<sup>5</sup> *Crosseing v. Honor*, 1 Vern. 180.

<sup>6</sup> *Lord Uxbridge v. Stavcland*, 1 Ves. 56.

VII. If for any reason founded on the substance of the case as stated in the bill, the plaintiff is not entitled to the relief he prays, the defendant may demur. Many of the grounds of demurrer already mentioned are perhaps referable to this head: and in every instance, if the case stated is such that admitting the whole bill to be true, the court ought not to give the plaintiff the relief or assistance he requires in the whole or in part, the defect thus appearing on the face of the bill is sufficient ground of demurrer.<sup>1</sup>

VIII. It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.<sup>2</sup> For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigations may be prevented.<sup>3</sup>\*

This general rule, however, admits of many qualifications. When a person who ought to be a party is out of the jurisdiction of the court,\* that fact being stated in the bill, and admitted by the defendants, or

<sup>1</sup> 7 Ves. 245; 2 Sch. & Lefr. 638; 6 Madd. 95.

<sup>2</sup> See *Knight v. Knight*, 3 P. Wms. 331. But see also *Cullen v. Duke of Queensberry*, 1 Bro. C. C. 101.

<sup>3</sup> 3 P. Wms. 333, 334; 2 Atk. 51; 7 Ves. 563; 12 Ves. 53; 1 Meriv. 262; *Beaumont v. Meredith*, 3 Ves. & Bea. 182; 1 Sch. & Lefr. 298.

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\* See Dissertation on Parties, prefixed to this edition.

proved at the hearing, is in most cases a sufficient reason for not bringing him before the court; and the court will proceed without him against the other parties, as far as circumstances will permit.<sup>1</sup> It is usual, however, to add the name of a person out of the jurisdiction of the court as a party to the bill, so far as may be necessary to connect his case with that of the other parties; and the bill may also pray process against him in case he should become amenable to such process; and if in fact he should become so amenable pending the suit, he ought to be brought before the court, either by issuing process against him, if process should have been prayed against him, and if not, by amending the bill for that purpose, if the state of the proceedings will admit of such amendment, or by supplemental bill if they will not.<sup>2</sup> \* If a person so out of the power of the court is required to be an active party in the execution of its decree, as where a conveyance by him is necessary, or if the decree ought to be pursued against him, as the foreclosure of a mortgage against the original mortgagor, or his representative or assign, the proceedings will unavoidably be to this extent defective.<sup>3</sup> A foreign corporation not amenable to the jurisdiction of the court falls within this description, and a corporation in Scot-

<sup>1</sup> 1 Ves. 385; and see *Cowslad v. Cely*, Prec. in Chan. 83; *Darwent v. Walton*, 2 Atk. 510; *Williams v. Whinyates*, 2 Bro. C. C. 399; and if the disposition of the property be in the power of the other parties, the court, it seems, will act upon it. 1 Sch. & Lefr. 240.

<sup>2</sup> See *Haddock v. Tomlinson*, 2 Sim. & Stu. 219.

<sup>3</sup> *Fell v. Brown*, 2 Bro. C. C. 277; see above, p. 129.

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\* Where a defendant is out of the jurisdiction, it is usual and expedient to pray that process may issue against him when he shall come within the jurisdiction, but the omission of his name in the prayer of process does not render the record defective. (*Haddock v. Thomlinson*, 2 Sim. & Stu. 219.)

land is considered for this purpose as a foreign corporation.<sup>1</sup>

When the object of a suit is to charge the personal property of a deceased person with a demand, it is generally sufficient to bring<sup>2</sup> before the court the person constituted by law to represent that property, and to answer all demands upon it;\* and the difficulty of bringing before the court, in some cases, all the persons interested in the subject of a suit, has also induced the court to depart from the general rule,<sup>2</sup> where the suit is on behalf of many in the same interest, and all the persons answering that description cannot easily be discovered or ascertained.\* Thus, a few creditors may substantiate a suit on behalf of themselves and the other creditors\* of their deceased debtor, for an account and application of his assets, real as well as personal, in payment of their demands;<sup>3</sup> and the decree being in that case applied to all the creditors, the other creditors may come in under it and obtain satisfaction of their demands equally with the plaintiffs in the suit; and if they decline to do so, they will be excluded the benefit of the decree, and will yet be considered as bound by acts done under its authority.<sup>4</sup> As a single creditor may sue for his demand out of personal assets, it is rather matter of convenience than of indulgence to permit such a suit by a few on

<sup>1</sup> Att. Gen. v. Baliol Coll. in Chan. 10 Dec. 1744; Lord Hardwicke, as to the University of Glasgow.

<sup>2</sup> Prec. in Chan. 592; Pearson v. Belchier, 4 Ves. 627; Lloyd v. Loaring, 6 Ves. 773; 11 Ves. 367; Adair v. New River Comp. 11 Ves. 429; Cockburn v. Thompson, 16 Ves. 321; Beaumont v. Meredith, 3 Ves. & Bea. 180; Meux v. Maltby, 2 Swanst. 277, and cases there

cited; and see below, p. 261, notes 1 and 2; Ellison v. Bignold, 2 Jac. & W. 503; Manning v. Thesiger, 1 Sim. & Stu. 106; Gray v. Chaplin, 2 Sim. & Stu. 267.

<sup>3</sup> 2 Ves. 313; Law v. Rigby, 4 Bro. C. C. 60.

<sup>4</sup> See Good v. Blewitt, 19 Ves. 336, and Angell v. Haddon, 1 Madd. 529.

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\* See Dissertation on Parties, prefixed to this edition.



behalf of all the creditors; and it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burdensome on the fund to be administered; for if a bill be brought by a single creditor for his own debt, he may as at law gain a preference by the judgment in his favor over other creditors in the same degree, who may not have used equal diligence.<sup>1</sup>

But some of a number of creditors, parties to a trust deed for payment of debts, have been permitted to sue on behalf of themselves and the other creditors named in the deed for execution of the trust,<sup>2</sup> although one of those creditors could not in that case have sued for his single demand without bringing the other creditors before the court. This seems to have been permitted purely to save expense and delay. If a great number of creditors thus specially provided for by a deed of trust, were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements; and if many were made defendants, the same inconvenience might happen, and additional expense would unavoidably be incurred.

By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and other legatees;\* and as he might sue for his own legacy only, a suit by one on behalf of all the legatees has the same tendency to prevent inconvenience and expense as a suit by one creditor on behalf of all creditors of the

<sup>1</sup> See *Att. Gen. v. Cornthwaite*, 2 Cox R. 44, an instance of a bill by a single creditor. And see *Heycock v. Heycock*, 2 Cas. in Chan. 124; *Bedford v. Leigh*, Dick. 707; *Hall v. Binney*, 6 Ves. 738.

<sup>2</sup> *Corry against Trist*, 1 Dec. 1766; *Routh v. Kinder*, 3 Swanst. 144, n.; *Boddy v. Kent*, 1 Meriv. 361; *Weld v. Bonham*, 2 Sim. & Stu. 91; *Handford v. Storie*, 2 Sim. & Stu. 196.

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\* See *Dissertation on Parties*, prefixed to this edition.

same fund;<sup>1</sup> but in a suit by a single legatee for his own legacy, unless the personal representative of the testator, by admitting assets for payment of the legacy, warrants an immediate personal decree against himself, by which he alone will be bound,<sup>2</sup> the court will direct a general account of all the legacies of the same testator, and payment of the legacy claimed ratably only with the other legacies, no preference being allowed amongst legatees in the administration of assets.<sup>3</sup>

When the court has pronounced a decree for an account and payment of debts or legacies under which all creditors or legatees may claim, it will restrain subsequent proceedings by a separate creditor or legatee, either at law or in equity, as the just administration of the assets would be greatly embarrassed by such proceeding.<sup>4</sup>

Where all the inhabitants of a parish had rights of common under a trust, a suit by one on behalf of himself and the other inhabitants was admitted.<sup>5</sup> It has been doubted whether the attorney general ought not to have been a party to that suit,<sup>6</sup> and accordingly, on a bill filed by some of the sufferers by a fire against the trustees of a collection made for the sufferers generally,

<sup>1</sup> 6 Ves. 779; and see *Morse v. Sadler*, 1 Cox R. 352.

<sup>2</sup> See *Boys v. Ford*, 4 Madd. 40.

<sup>3</sup> To a bill by a specific or pecuniary legatee for payment, neither the residuary legatees (see 1 Vern. 261; *Wainwright v. Waterman*, 1 Ves. jr. 311; 1 Madd. 448), nor generally (see 2 Cas. in Chan. 124; and see *Morse v. Sadler*, 1 Cox R. 352) any other of the legatees, need be made parties; but on such a bill by one of several residuary legatees, he must in general bring before the court all the other persons interested in the residue, after satisfaction of the creditors and the specific and pecuniary legatees, 2 Cas. in Chan. 124; *Parsons*

*v. Neville*, 3 Bro. C. C. 365; 16 Ves. 328. And see 1 Sim. & Stu. 106.

<sup>4</sup> 1 Sch. & Lefr. 299, and cases cited there, in note b; and see *Douglas v. Clay*, Dick. 393; *Brooks v. Reynolds*, Dick. 603; s. c. 1 Bro. C. C. 183; *Rush v. Higgs*, 4 Ves. 638; *Paxton v. Douglas*, 8 Ves. 520; *Terrewest v. Featherby*, 2 Meriv. 480; *Curre v. Bowyer*, 3 Madd. 456; *Farrell v. Smith*, 2 Ball & B. 337; 1 Jac. R. 122; *Lord v. Wormleighton*, 1 Jac. R. 148.

<sup>5</sup> 1 Cas. in Chan. 269; *Blackham* against *The Warden and Society of Sutton Coldfield*. See *Att. Gen. v. Heelis*, 2 Sim. & Stu. 67.

<sup>6</sup> See *Att. Gen. v. Moses*, 2 Madd. 294.

it was objected at the hearing, that the attorney general ought to have been a party, and that otherwise the decree would not be conclusive; and the cause was accordingly ordered to stand over for the purpose of bringing the attorney general before the court.<sup>1</sup> But where a bill was brought for distribution of private contributions, the objection that the attorney general was not a party was overruled.<sup>2</sup>

For the application of personal estate amongst next of kin, or amongst persons claiming under a general description, as the relations of a testator or other person, where it may be uncertain who are all the persons answering that description, a bill has been admitted by one claimant on behalf of himself and the other persons equally entitled.<sup>3</sup> And the necessity of the case has induced the court, especially of late years, frequently to depart from the general rule, where a strict adherence to it would probably amount to a denial of justice; and to allow a few persons to sue on behalf of great numbers having the same interest.<sup>4</sup>\*

There are also other cases in which the interests of persons not parties to a suit may be in some degree

<sup>1</sup> Overall *v.* Peacock, 6 Dec. 1737. See Wellbeloved *v.* Jones, 1 Sim. & Stu. 40.

<sup>2</sup> Lee *v.* Carter, 17 Nov. 1740, MS. N. reported 2 Atk. 84; but this point is not noticed by Atkyns. Nutt *v.* Brown, 20 July, 1745; Anon. 3 Atk. 227; 1 Sim. & Stu. 43. The attorney or solicitor general is usually a necessary party to suits relating to charity funds. See Wellbeloved *v.* Jones, 1 Sim. & Stu. 40; and above, pp. 118, 196.

<sup>3</sup> See Ambl. 710; 1 Russ. R. 166.

<sup>4</sup> Chancey *v.* May, Prec. in Chan. 592, Finch ed.; Gilb. 230; 1 Atk. 284;

Leigh *v.* Thomas, 2 Ves. 312; Pearson *v.* Belchier, 4 Ves. 627; Lloyd *v.* Loaring, 6 Ves. 773; Good *v.* Blewitt, 13 Ves. 397; Cockburn *v.* Thompson, 16 Ves. 321; 3 Meriv. 510; Manning *v.* Thesiger, 1 Sim. & Stu. 106; Baldwin *v.* Lawrence, 2 Sim. & Stu. 18; Gray *v.* Chaplin, 2 Sim. & Stu. 267; but it seems that, except perhaps in the common cases of this kind, it is necessary to allege that the parties are too numerous to be individually named. Weld *v.* Bonham, 2 Sim. & Stu. 91; see, however, Van Sandau *v.* Moore, 1 Russ. R. 441.

affected, and yet the suit has been permitted to proceed without them, as a bill brought by a lord of a manor against some of the tenants, or by some of the tenants against the lord, on a question of common; or by a parson for tithes against some of the parishioners, or by some of the parishioners against the parson, to establish a general parochial modus.<sup>1</sup>

In many cases the expression that all persons interested in the subject must be parties to a suit, is not to be understood as extending to all persons who may be consequentially interested. Thus, in the case of a bill which may be brought by a single creditor for satisfaction of his single demand out of the assets of a deceased debtor, as before noticed, although the interest of every other unsatisfied creditor may be consequentially affected by the suit, yet that interest is not deemed such as to require that the other creditors should be parties; notwithstanding, the decree if fairly obtained will compel them to admit the demand ascertained under its authority as a just demand, to the extent allowed by the court in the administration of assets; but they will not be bound by any account of the assets taken under such a decree. So in all cases of bills by creditors or legatees, the persons entitled to the personal assets of a deceased debtor or testator, after payment of the debts or legacies, are not deemed necessary parties, though interested to contest the demands of the creditors and legatees; and if the suits be fairly conducted, they will be bound to allow the demands admitted in those suits by the court, though

<sup>1</sup> 1 Atk. 283; 3 Atk. 247; Chaytor v. Trin. Coll. Anstr. 841; 11 Ves. 444; and see Adair v. New River Comp. 11 Ves. 429; 16 Ves. 328; 1 Jac. & W. 369; 2 Swanst. 282; but it appears that where it is attempted to proceed against

some individuals representing a numerous class, as against churchwardens representing the parishioners in respect of a church rate, it must be alleged that the suit is brought against them in such representative character. 5 Madd. 13.

they will not be bound by any account of the property taken in their absence.<sup>1</sup>

To a bill to carry into execution the trusts of a will disposing of real estate by sale or charge of the estate, the heir at law of the testator is deemed a necessary party, that the title may be quieted against his demand ;\* for which purpose the bill usually prays that the will may be established against him by the decree of the court ; but if the testator has made a prior will containing a different disposition of the same property, and which remains uncanceled, and has not been revoked except by the subsequent will, it has not been deemed necessary to make the persons claiming under the prior will parties ; though if the subsequent will be not valid, those persons may disturb the title under it as well as the heir of the testator. If, however, the prior will is insisted upon as an effective instrument notwithstanding the subsequent will, the persons claiming under it may be brought before the court, to quiet the title, and protect those who may act under the orders of the court in executing the latter instrument.<sup>2</sup>

If no heir at law can be found, the king's attorney general is usually made a party to a bill for carrying the trusts of a devise of real estate into execution, supposing the escheat to be to the crown, if the will set up by the bill should be subject to impeachment.<sup>3</sup>

<sup>1</sup> See the case of *Bedford v. Leigh*, *Dick.* 707. And see *Lawson v. Barker*, 1 Bro. C. C. 303 ; *Wainwright v. Waterman*, 1 Ves. jr. 313 ; *Brown v. Dowthwaite*, 1 Madd. 448.

*v. Ingledew*, 3 P. Wms. 91 ; *Lewis v. Naugle*, 2 Ves. 431 ; 1 Ves. jr. 29.

<sup>3</sup> See the case of *Att. Gen. v. Mayor of Bristol*, 3 Madd. 319 ; s. c. 2 Jac. & W. 294.

<sup>2</sup> See on the general subject, *Harris*

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\* See Dissertation on Parties, prefixed to this edition.

But if any person should claim the escheat against the crown, that person may be a necessary party.

If the heir at law of a testator who has devised a real estate on trusts should be out of the jurisdiction of the court, and that fact should be charged and proved, the court will proceed to direct the execution of the trusts, upon full proof of the due execution of the will and sanity of the testator; though that evidence cannot be read against the heir if he should afterwards dispute the will, and the court therefore cannot establish the will against him, or in any manner insure the title under it against his claims.<sup>1</sup>\*

Where real property in question is subject to an entail, it is generally sufficient to make the first person in being, in whom an estate of inheritance is vested, a party with those claiming prior interests, omitting those who may claim in remainder or reversion after such vested estate of inheritance;<sup>2</sup> and a decree against the person having that estate of inheritance will bind those in remainder or reversion, though by failure of all the previous estates the estates then in remainder or reversion may afterwards vest in possession.<sup>3</sup> It has therefore been determined that a person so entitled in remainder, and afterwards becoming entitled in possession, may appeal from a decree

<sup>1</sup> See *Williams v. Whinyates*, 2 Bro. C. C. 399; and see *French v. Baron*, 2 Atk. 120; s. c. Dick. 138.

<sup>2</sup> 2 Sch. & Lefr. 210; and see *Anon.* 2 Eq. Cas. Abr. 166; 2 Ves. 492; Pel-

ham v. Gregory, 1 Eden R. 518; s. c. 3 Bro. P. C. 204, Toml. ed.

<sup>3</sup> See *Lloyd v. Johnes*, 9 Ves. 37; 16 Ves. 326.

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\* A decree for establishing a will and executing the trusts thereof may be impeached by an *original* bill by the heir at law in case he was not served with a subpoena, though named as a party defendant to the bill in the cause in which such decree was made. He need not file a supplemental bill in that cause. (*Waterton v. Croft*, 6 Sim. 431.)

made against a person having a prior estate of inheritance, and cannot avoid the effect of the decree by a new bill.<sup>1</sup>

Contingent limitations and executory devises to persons not in being may in like manner be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights.<sup>2</sup> \*

If a person entitled to an interest prior in limitation to any estate of inheritance before the court, should be born pending the suit, that person must be brought before the court by a supplementary proceeding. And if by the determination of any contingency a new interest should be acquired, not subject to destruction by a prior vested estate of inheritance, the person having that interest must be brought before the court in like manner. And if by the death of the person having, when the suit was instituted, the first estate of inheritance, that estate should be determined, the person having the next estate of inheritance, and all the persons having prior interests, must be so brought before the court.<sup>3</sup>

Trustees of real estate for payment of debts or legacies may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, which in

<sup>1</sup> *Giffard v. Hort*, 1 Sch. & Lefr. 386; 122; and *Anon.* 2 Eq. Cas. Abr. 166; *Ib.* 411. *Sherrit v. Birch*, 3 Bro. C. C. 229.

<sup>2</sup> See *Handcock v. Shaen*, Coll. P. C.

<sup>3</sup> See 2 Sch. & Lefr. 210.

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\* See Dissertation on Parties, prefixed to this edition.

many cases would be almost impossible ; and the rights of the creditors or legatees will be bound by the decision of the court against the trustees.<sup>1</sup> \*

The interests of persons claiming under the possession of a party whose title to real property is disputed, as his occupying tenants,† under leases, are not deemed *necessary* parties ; though if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a court of equity in their absence ; and though if his title was equitable merely, they may be affected by a decision against that title. Sometimes, if the existence of such rights is suggested at the hearing, the decree is expressly made without prejudice to those rights, or otherwise qualified according to circumstances. If therefore it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it ; and where the right is of a higher nature, as a mortgage, the person claiming it is usually made a party.<sup>2</sup> †

To a suit for the execution of a trust, by or against those claiming the ultimate benefit of the trust, after the satisfaction of prior charges, it is not necessary to bring before the court the persons claiming the benefit of such prior charges ; and, therefore, to a bill for the application of a surplus paid after payment of debts and legacies, or other prior incumbrances, the credit-

<sup>1</sup> See *Franco v. Franco*, 3 Ves. 75 ;  
and see *Curteis v. Candler*, 6 Madd.  
123.

<sup>2</sup> See 2 Ves. 450.

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\* In *Harrison v. Stewardson*, Sir James Wigram, V. C., observed : " It is impossible to say that the practice of the court is in conformity with this passage ; for almost the universal rule is to make legatees parties where legacies are charged on real estate." (2 Hare, 532.)

† See Dissertation on Parties, prefixed to this edition.



ors, legatees, or other prior incumbrancers, need not be made parties.<sup>1</sup> \* And persons having demands prior to the creation of such a trust may enforce those demands against the trustees without bringing before the court the persons interested under the trust, if the absolute disposition of the property is vested in the trustees.\* But if the trustees have no such power of disposition, as in the case of trustees to convey to certain uses, the persons claiming the benefit of the trust must also be parties. Persons having specific charges on the trust property in many cases are also necessary parties; but this will not extend to a general trust for creditors or others whose demands are not distinctly specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who may answer a general description, might greatly embarrass a prior claim against a trust property.<sup>2</sup>

If a debt by a covenant or obligation binding the heir of the debtor is demanded against his real assets in the hands of a devisee under the statute 3 & 4 Wm. & M. c. 14, the heir must always be a party;<sup>3</sup> and if any assets have descended to the heir they are first applicable, unless the assets devised are charged with debts in exoneration of the heir. The personal representative of the deceased debtor is also generally a necessary party,<sup>4</sup> as a court of equity will first apply

<sup>1</sup> See Anon. 3 Atk. 572.

\* As to *cestuis que trust* being parties, see *Kirk v. Clark*, Prec. in Chan. 275; *Adams v. St. Leger*, 1 Ball & B. 181; *Calverley v. Phelps*, 6 Madd. 229; *Douglas v. Horsfall*, 2 Sim. & Stu. 184. It may here be observed, that if the trust property be personal, and its amount be ascertained, one entitled to an aliquot part thereof may sue the

trustees for the same, without making the persons claiming the other shares thereof parties to the suit. *Smith v. Snow*, 3 Madd. 10.\*

<sup>2</sup> *Gawler v. Wade*, 1 P. Wms. 100; *Warren v. Stawell*, 2 Atk. 125.

<sup>3</sup> *Knight v. Knight*, 3 P. Wms. 331; 3 P. Wms. 350; 3 Atk. 406; 1 Eq. Cas. Abr. 73; *Lowe v. Farlie*, 2 Madd. 101; 2 Sim. & Stu. 292.

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\* See Dissertation on Parties, prefixed to this edition.

the personal, in exoneration of the real assets.\* When there has been no general personal representative, a special representative by an administration limited to the subject of the suit has been required. In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the court. This seems to be required rather to satisfy the court that there are no such assets to satisfy the demand: for although the limited administrator can collect no such assets by the authority under which he must act, yet as the person entitled to general administration must be cited in the ecclesiastical court before such limited administration can be obtained, and as the limited administration would be determined by a subsequent grant of general administration, it must be presumed that there are no such assets to be collected, or a general administration would be obtained.<sup>1</sup>\*

The personal representative thus brought before the court must be a representative constituted in England; and although there may be personal assets in another country, and a personal representative constituted there, yet as he may not be amenable to the process of the court, and those assets must be subject to administration according to the laws of that country, such a representative is not deemed a necessary party

<sup>1</sup> See the case of *Glass v. Oxenham*, 2 Atk. 121. Where probate has been granted, and the executor has subsequently departed out of the realm, a special administration may, after twelve months from the decease of the testator, be obtained to defend a suit, or to carry a decree into execution, by virtue of stat. 38 Geo. III, c. 87. *Rainsford v. Taynton*, 7 Ves. 460.

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\* See Dissertation on Parties, prefixed to this edition.

to substantiate a demand against the real assets in England.<sup>1</sup>\*

Where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the court to proceed to a decision on the claim; and when a right is clearly vested as a trust term, which is required to be assigned, an administration of the effects of the deceased trustee, limited to the trust term, is necessary to warrant the decree of the court for assignment of the term.

In some cases, when it has appeared at the hearing of a cause, that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative on the hearing, the court has made a decree directing proceedings before one of the masters of the court, without requiring the representative to be made a party by amendment or otherwise; and has given leave to the parties in the suit to bring a representative before the master on taking the accounts or other proceedings directed by the decree, which may concern the rights of such representative; and a representative thus brought before the master is considered as a party to the cause in the subsequent proceedings.<sup>2</sup>

In most cases the person having the legal title in the subject must be a party, though he has no beneficial interest, that the legal right may be bound by the

<sup>1</sup> See *Jauncy v. Sealey*, 1 Vern. 397; and *Lowe v. Farlie*, 2 Madd. 101; C. C. 497; 1 Ves. jr. 69. *Logan v. Farlie*, 2 Sim. & Stu. 284.

<sup>2</sup> See *Fletcher v. Ashburner*, 1 Bro.

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\* See Dissertation on Parties, prefixed to this edition.

decree of the court.<sup>1</sup> Thus if a bond or judgment be assigned, the assignor as well as the assignee must be a party, for the legal right of action remains in the assignor.<sup>2</sup>

In some cases, however, it may still remain a question of considerable difficulty who are necessary parties to a suit. It may indeed be doubtful until the decision of the cause what interests may be affected by that decision; and sometimes parties must be brought before the court to litigate a question, who had, according to the decision, no interest in the subject, and as to whom therefore, whether plaintiffs or defendants, the bill may be finally dismissed, though the court may make a decree on the subject as between other parties, which will be conclusive on the persons as to whom the bill may be so dismissed, but which the court would not pronounce in their absence, if amenable to its jurisdiction.

Sometimes, too, a plaintiff, by waiving a particular claim, may avoid the necessity of making parties who might be affected by it, though that claim might be an evident consequence of the rights asserted by the bill against other parties. This, however, cannot be done to the prejudice of others.

Whenever a want of parties appears on the face of a bill, the want of proper parties is a cause of demurrer.<sup>3</sup> But if a sufficient reason for not bringing a nec-

<sup>1</sup> As to the case of a trustee, see *Prec. in Chan.* 275; 3 *Barnard*, 325; *Burt v. Denney*, 2 *Bro. C. C.* 225; 7 *Ves.* 11; *Cholmondeley v. Clinton*, 2 *Meriv.* 71.

<sup>2</sup> See *Cathcart v. Lewis*, 1 *Ves. jr.* 463; but see *Brace v. Harrington*, 2 *Atk.* 235; and *Blake v. Jones*, 3 *Anstr.* 651. See also *Ryan v. Anderson*, 3 *Madd.* 174; *Edney v. Jewell*, 6 *Madd.* 165; 2 *Sim. & Stu.* 253.

<sup>3</sup> *Clark v. Lord Angier*, 1 *Cas. in Chan.* 41; *Nels. R.* 78, 93; *Astley v. Fountaine*, *Finch R.* 4; *Weston v. Keighley*, *Finch R.* 82; *Atwood v. Hawkins*, *Finch R.* 113; *Galle v. Greenhill*, *Finch R.* 202; 3 *P. Wms.* 311, note; *Knight v. Knight*, 3 *P. Wms.* 331; 2 *Atk.* 570; 1 *Eq. Cas. Abr.* 72; 2 *Eq. Cas. Abr.* 165; *Cockburn v. Thompson*, 16 *Ves.* 321; *Cook v. Butt*, 6 *Madd.* 53; *Weld v. Bonham*,

essary party before the court is suggested by the bill,\* as if a personal representative is a necessary party, and the representation is charged to be in litigation in the ecclesiastical court;<sup>1</sup> or if the bill seeks a discovery of the parties interested in the matter in question for the purpose of making them parties, and charging that they are unknown to the plaintiff, a demurrer for want of the necessary parties will not hold.<sup>2</sup>

A demurrer for want of parties must show who are the proper parties: not indeed by name, for that might be impossible, but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties.<sup>3</sup> † In case of a demurrer for want of parties, the court has permitted the plaintiff to amend, when the demurrer has been held good upon argument.<sup>4</sup>

IX. The court will not permit a plaintiff to demand, by one bill, several matters of different natures against several defendants;<sup>5</sup> for this would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which

<sup>2</sup> Sim. & Stu. 91; *Gray v. Chaplin*, 2 Sim. & Stu. 267; *Maule v. Duke of Beaufort*, 1 Russ. R. 349. *Quære*, whether a demurrer for want of parties should be to the whole bill. See *E. I. Company v. Coles*, reported 3 Swanst. 142, note; and see the cases of *Atwood v. Hawkins*, Finch R. 113; *Astley v. Fountaine*, Finch R. 4; and *Bressenden v. Decreets*, 2 Cas. in Can. 197, cited 3 Swanst. 144, note.

<sup>1</sup> 2 Atk. 51; and see *Jones v. Frost*, 3 Madd. 1.

<sup>2</sup> *Bowyer v. Covert*, 1 Vern. 95; *Heath v. Percival*, 1 P. Wms. 682, 684.

<sup>3</sup> Upon this subject see 6 Ves. 781; 11 Ves. 369; 16 Ves. 325; 3 Madd. 62.

<sup>4</sup> *Bressenden v. Decreets*, 2 Cas. in Chan. 197.

<sup>5</sup> See 5 Madd. 146.

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\* In order to dispense with making a person a defendant, it is not sufficient to allege that he absconded a year before the bill was filed; for he might have returned before the filing of the bill. (*Penfold v. Nunn*, 5 Sim. 405.)

† *Lund v. Blanshard*, 4 Hare, 23.

he has no connection. A defendant may therefore demur because the plaintiff demands several matters of different natures of several defendants by the same bill.<sup>1</sup> But as the defendants may combine together to defraud the plaintiff of his rights, and such a combination is usually charged by a bill, it has been held that the defendant must so far answer the bill as to deny combination.<sup>2</sup> In this, however, the defendant must be cautious; for if the answer goes farther than merely to deny combination, it will overrule the demurrer.<sup>3</sup> \* A demurrer of this kind will hold only where the plaintiff claims several matters of different natures; but when one general right is claimed by the bill, though the defendant have separate and distinct rights, a demurrer will not hold.<sup>4</sup> As where a person claiming a general right to the sole fishery of a river, filed a bill against several persons claiming several rights in the fishery, as lords of manors, occupiers of lands, or otherwise.<sup>5</sup> For in this case the plaintiff did not claim several separate and distinct rights, in opposition to several separate and distinct rights claimed by the defendants; but he claimed one general and entire right,

<sup>1</sup> *Berke v. Harris*, Hardr. 337. And as late instances of demurrers for multifariousness, see *Ward v. Cooke*, 5 Madd. 122; *Salvidge v. Hyde*, 5 Madd. 138; s. c. 1 Jac. R. 153; *Turner v. Doubleday*, 6 Madd. 94; *Exeter Coll. v. Rowland*, 6 Madd. 94; *Kaye v. Moore*, 1 Sim. & Stu. 61; *Dew v. Clarke*, 1 Sim. & Stu. 108; *Turner v. Robinson*, 1 Sim. & Stu. 313; and *Shackell v. Macaulay*, 2 Sim. & Stu. 79.

<sup>2</sup> *Powell v. Arderne*, 1 Vern. 416. As to the interpretation to be put upon this passage, see 8 Ves. 527; and as to general charge of combination, see *sup.* pp. 135-36. The proposition in the text, however, so far as it may apply to the

usual general charge of combination, seems now to have been overruled. *Brooks v. Lord Whitworth*, 1 Madd. 86; *Salvidge v. Hyde*, 5 Madd. 138. And the ultimate decision in the latter case, upon appeal, reversing the former, does not appear to have had any reference to that proposition. s. c. 1 Jac. 151.

<sup>3</sup> *Hester v. Weston*, 1 Vern. 463.

<sup>4</sup> See the cases cited above, pp. 238-239. And see *Buckle v. Atloe*, 2 Vern. 37. As to cases of infringement of copyrights and patents, see *Dilly v. Doig*, 2 Ves. jr. 486.

<sup>5</sup> *Mayor of York v. Pilkington*, 1 Atk. 282.

though set in opposition to a variety of distinct rights claimed by the several defendants. So where a lord of a manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders, and leaseholders, who owed rents to the lord, but had confused the boundaries of their several tenements, praying a commission to ascertain the boundaries; and it was objected at the hearing that the suit was improper, as it brought before the court many parties having distinct interests; it was answered that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenements, and a decree was made accordingly.<sup>1</sup> \*

<sup>1</sup>Magdalen Coll. against Athill and the distinctions taken in *Berke v. Har-*  
others, at the Rolls, 26 Nov. 1753. See *ris, Hardr.* 337.

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\* *Cases where a bill is multifarious.*—It is not allowable to unite in the same information an application as to abuses in a school with an application as to abuses in a college, though the latter are abuses in relation to estates given to the college for the benefit of five scholars from the school; for the school and the college are distinct foundations, and one defense cannot be made as to the abuses in both. (*Attorney General v. St. John's College*, 7 Sim. 241.)

Two or more distinct matters cannot be included in the same suit, where it does not clearly appear that they are homogeneous, with the exception of minute differences, even in the case of a sole plaintiff and a sole defendant. So that where an information, after stating a will by which property was given to a city company, for the purpose of making loans to young men free of the company, to assist them in trade and otherwise, alleges that divers other donations and bequests have been made to the company for the purpose of making loans to young men (generally and without restriction) for their advancement in business and life, and it prays relief in respect of the first mentioned and such other gifts and bequests, it is multifarious. (*Attorney General v. The Goldsmiths' Company*, 5 Sim. 670.)

If a person, who is the personal representative both of a testator and of the testator's residuary devisee and legatee, files a bill against an agent for an account of the rents of the real estate and of the personal estate, re-

As the court will not permit the plaintiff to demand by one bill several matters of different natures

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ceived by such agent since the testator's death, the bill is multifarious. (*Weeks v. Pitt*, 10 Law J. [N. S.] Ch. Rep. 5.)

And so where the heir, who is also one of the next of kin of an intestate, joins with the other next of kin in a bill against the administratrix, who has entered into possession of the real estate, as well as the personalty, for an account of the intestate's real and personal estates, the bill is demurrable for multifariousness. (*Dunn v. Dunn*, 2 Sim. 329; see also *Maud v. Aclom*, Ib. 331.)

The union of an equitable ejectment bill against one person, and a bill to redeem against another person, is multifarious. (*Plumbe v. Plumbe*, 4 Y. & C. Eq. Ex. 345.)

A bill for a discovery and a commission or commissions to examine witnesses in aid of the defense to two separate actions for two separate libels, is multifarious and demurrable; for if the same commission or commissions were to furnish the defense for both actions, the plaintiff at law would be delayed from proceeding in either of the actions until the defendants were prepared for their defense in both. (*Shackell v. Macaulay*, 2 Sim. & Stu. 79.)

If a vendor files a bill against a purchaser for a specific performance of the purchase contract, and in the same bill prays that another defendant, who has agreed with the vendor to execute a release in order to perfect the title, may be decreed to execute such release, the bill is multifarious; for the purchaser ought not to be harassed with a distinct agreement between the vendor and a third person, although such agreement was designed to be subservient to the performance of the purchase contract. (*Reynolds v. Johnston*, 7 Law J. [O. S.] Ch. Rep. 45.)

A bill for an account of a testator's estate, and also to set aside sales made by the executor and trustee to himself and another person, is multifarious. (*Salvidge v. Hyde*, Jac. 151.)

A bill both for the administration of general personal estate and for the redemption of a mortgage is multifarious. (*Pearse v. Hewitt*, 7 Sim. 471.)

If to a foreclosure suit, a third person, who has some interest in the equity of redemption, is made a party, and in a bill of revivor supplemental matter is introduced, with reference to a lien claimed by the mortgagor on land in the mortgagee's possession which was allotted to the mortgagor in respect of the mortgaged premises, such a bill is multifarious as regards such third person. (*Lloyd v. Douglas*, 4 Y. & C. Eq. Ex. 448.)

Where a bill is not sustainable as a bill of interpleader, and it mixes up



against several defendants, so it will not permit a bill to be brought for part of a matter only; but

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distinct claims of different defendants, although connected with the same subject-matter, it is multifarious. (*Bignold v. Audland*, 11 Sim. 24.)

A bill praying for a declaration that a person to whose nominee two debts due to different creditors have been assigned may be declared a trustee of such debts for another party, and may be restrained from proceeding at law upon judgments obtained for them, is demurrable for multifariousness. (*Miller v. Walker*, 9 Jur. 107.)

A bill for an account of agencies with two different firms, though carrying on the same concern, and only different by reason of a change of some of the partners, is multifarious, if the allegations of the bill are such that, when taken most strongly against the plaintiff, they show that the dealings with the two firms were separate transactions. (*Benson v. Hadfield*, 5 Beav. 546.)

Where a person makes a shipment of goods on account of another, and advances money to him upon the goods, and afterwards the same person and his partner make other shipments of goods on account of such other party and his partner, and advance money to them upon those goods; and the proceeds of all the shipments are remitted to another firm; and the surviving partners of that firm file a bill of interpleader against the assignees of the person who made the first shipment and his partner, and the assignees of the person on whose account the first shipment was made and his partner, and pay the balance of all the remittances into court, as one balance; and the assignees of the person who made the first shipment and his partner file a bill against the surviving partners of the firm to whom the remittances were made, and against the assignees of the person on whose account the first shipment was made and his partner, for an account of what is due to the person by whom the first shipment was made, and also of what is due to him and his partner on account of their advances; the suit is multifarious; because the first transaction between two persons, when alone, ought not to be mixed up with the transactions between the same persons after each had entered into partnership with another person. (*Miller v. Crawford*, 9 Law J. [O. S.] Ch. R. 193, L. C.)

*Cases where a bill is not multifarious.*—It does not follow, as a necessary consequence, that in every case in which a bill is multifarious as to one defendant, it is multifarious as to the rest. (*Att. Gen. v. Cradock*, 8 Sim. 467.)

Where a case is an entire case as against one defendant, the court will not attach weight to the objection that another defendant is connected only with some portion of the whole case: for, in order to obviate this objection, it would be necessary to split an entire case. And hence where a bond is improperly given to a person by a corporation, and a rate is im-

to prevent the splitting of causes, and consequent multiplicity of suits, will allow a demurrer upon this ground.<sup>1</sup>

<sup>1</sup> 1 Vern. 29; *Edgworth v. Swift*, 4 Bro. P. C. 654, Toml. ed. See above, pp. 238, 239.

posed to provide a fund to meet the demand upon the bond, an information seeking protection against both the bond and the rate is not multifarious: for as the illegality of the bond creates an illegality in the rate, there is an entire case as against the corporation: and though the obligee has nothing to do with the rate, but only with the bond, yet the information is not multifarious as to him. (*Att. Gen. v. Parr*, 8 Cl. & Fin. 409.)

Several charitable trusts, especially if the property is small, may be comprised in one information, where one and the same party is proceeded against (such as a city company), and where the several trusts, though created by different persons, and at different times, have all a common subject-matter (such as moneys given in trust to be lent), and where the persons beneficially interested in the trusts belong to the same body (as, for instance, to the company proceeded against), although very different descriptions of persons among that body are respectively the objects of the respective charities. (*Att. Gen. v. Merchant Tailors' Company*, 1 M. & K. 189.)

Where an information is filed against the trustees of certain charities, and against a person who, in concert with one of the trustees, has effected an exchange of property in which they were jointly interested for a portion of the charity estate, and such information alleges that such exchange is fraudulent, and that the charity estate has been improperly managed by the trustees, and prays a general account, and a scheme, and that the exchange may be set aside; a demurrer for multifariousness, put in by the party who had colluded with the trustee in the exchange, will be overruled. (*Att. Gen. v. Cradock*, 3 My. & Cr. 85.)

Where executors have possessed themselves of the rents and profits of real estate and personal estate devised and bequeathed to different parties, and have blended both together, so that they cannot be distinguished, a bill filed against the executors and the persons interested in the personal estate and the rents and profits of the real estate, for an account of both, is not demurrable for multifariousness or misjoinder. (*Sanders v. Kelsey*, 10 Jur. 833.)

The administration of the real and personal estates of two deceased partners, towards the payment of their joint and separate debts, may be comprised in one suit; for the rule is, that the joint estate must first be applied in payment of the joint debts, and then the surplus of the separate estate of each partner which may remain after payment of the separate

A discovery being compelled upon a bill praying relief, for the purpose of enabling the plaintiff to

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debts of that partner is contributable to supply the deficiency of the joint estate to pay the joint debts. And those who are interested in the surplus of the separate estate of one partner ought to be present to a suit instituted for the purpose of ascertaining what is the surplus of the separate estate of another partner. (*Brown v. Douglas*, 11 Sim. 283; *Brown v. Weatherby*, 12 Sim. 6.)

Where an action is brought by an administrator of an intestate against the executors of the widow of the intestate, who had possessed assets without having taken out administration, for moneys alleged to be due to the intestate's estate; and the executors of the widow and the children of the intestate file a bill against his administrator, for an account both of the estate of the intestate and of the estate of the widow, and of what is due from the former estate to the latter, and for an injunction to restrain the action, the bill is not multifarious; for in such case the court cannot administer relief without taking the accounts of both estates. (*Lewis v. Edmund*, 6 Sim. 251.)

Where a policy of insurance is underwritten by Lloyd's underwriters, and another policy is effected by the same party with the corporation of the London Assurance, these bodies of underwriters may join in one bill against the assured. (*Mills v. Campbell*, 2 Y. & C. Eq. Ex. 391.)

Where a bill is filed by the drawer and acceptor of four bills of exchange, against a person to whom they had been delivered for the purpose of being discounted, and against his indorsees, and against subsequent indorsees who are the holders of the bills, praying for a delivery up of the bills on the ground of a fraud to which all the defendants were privy, such a bill is not multifarious. (*Lord Foley v. Carlon*, 1 Younge, 373.)

If a bill is filed by two executors for an account of assets received by an agent, and for the performance of an agreement for a set-off of such assets against moneys lent by him to them individually on their respective separate accounts, and for an injunction to restrain an action brought after notice of such agreement, by indorsees of promissory notes given by them for the moneys so lent, the bill is not multifarious, nor is there a misjoinder of plaintiffs. (*Davis v. Cripps*, 2 Y. & C. Chan. Cas. 430.)

Where the executors of a testator refuse to file a bill to have a testator's estate recouped out of a fund in court, in respect of a debt paid out of that estate, which ought to have been paid out of such fund, and there are no assets of the testator remaining for payment of a judgment creditor and of a mortgagee whose mortgage debt has priority over the judgment debt; the judgment creditor may, without any objection on the ground of multifariousness, file a bill to have the testator's estate recouped, and the mort-

obtain that relief, the discovery is in general incidental to the relief,' and a demurrer to the relief con-

<sup>1</sup> 1 Sim. & Stu. 93.

gage and judgment debts paid out of the sum as to which the estate of the testator is sought to be so recouped; and for that purpose the mortgagee and the party interested in the fund above mentioned, as well as the executors, are proper parties. (*Lancaster v. Evors*, 4 Beav. 158.)

A bill to restrain commissioners under an act of parliament from paying one part and draining another part of the same plot of ground, is not multifarious. (*Birley v. The Constables, &c. of Charlton-upon-Medlock*, 3 Beav. 499.)

Where, by a deed executed before marriage, a husband vests a fund in two trustees, upon trust for his wife for life, and after her decease, for the benefit of the children of the marriage, with a proviso that the persons to be appointed guardians by his will, with the trustees, shall after the decease of his wife, have authority to apply the interest and part of the capital for the maintenance and advancement of the children; and by another deed, after marriage, he vests another fund in two other trustees, upon similar trusts, with a similar proviso; and by his will, after some specific bequests to his wife, he bequeaths his property to three of the trustees of the deeds, upon certain trusts, for the benefit of his children, and appoints them executors and guardians of his infant children; and the wife and children file a bill against the four trustees for a performance of the trusts of the deeds, and for an account of the personal estate and debts, and an administration of the property; a demurrer by the three trustees appointed guardians, put in on the ground of multifariousness, will be overruled, for there is a common interest in all the plaintiffs under all the instruments; and all the defendants are accounting parties, though they are not all parties to all the instruments; and the three demurring defendants have all an interest, not only under the will, but also under the deeds, by force of the provisos therein contained. (*Campbell v. Mackay*, 1 My. & Cr. 602.)

Where third parties have been implicated in what they knew to be a misapplication of the funds of a joint stock company, they may be made defendants to a bill by some of the shareholders of the company, although the bill, besides seeking relief against such third parties, prays also for the general administration of the assets of the company. (*Lund v. Blanshard*, 4 Hare, 9.) In the case in which this point arose, the company was a banking company, and the third party was another banking company.

If a *cestui que trust* of a sum of money covenanted to be settled seeks payment thereof out of the assets of the covenantor, and for a general

sequently extends to the discovery likewise.<sup>1</sup>\* But as the court entertains a jurisdiction in certain cases for

<sup>1</sup> See *Baker v. Mellish*, 10 Ves. 544; general demurrer would perhaps be overruled. See *Brandon v. Sands*, 2 Ves. jr. 514; *Brandon v. Johnson*, Ib. 517.  
 3 Meriv. 502. It may happen, however, that the relief sought may be consequential to discovery to which the plaintiff is entitled, in which case a

administration of his personal estate for that purpose, if assets be not admitted, and also seeks to impeach a prior security claimed over the whole of the covenantor's property by one of the trustees of the settlement; a demurrer by him for multifariousness in the usual form is bad, because all the matters may come into consideration in the course of taking the account, and therefore are not "distinct," and the defendant trustee is "interested" in the account as trustee. (*Addison v. Walker*, 4 Y. & C. Eq. Ex. 442.)

A bill is not multifarious because it seeks to enforce one remedy against one defendant, and another remedy, in addition to that remedy, against another defendant. (*Manners v. Rowley*, 10 Sim. 470.)

*Right mode of taking the objection of multifariousness.*—In a case where defendant demurred to a bill for multifariousness, and it was then amended so as to preclude a demurrer on that ground, but he insisted on the same objection in his answer to the amended bill, Sir J. Wigram, V. C., said, "It would certainly be most unjust if a plaintiff could compel a defendant to continue a party to a multifarious record, merely by inserting false allegations in the bill. A plea that a bill is multifarious is a defense I have never seen, though I know such a plea has, whether successfully or not, been attempted. \* \* \* In what form this objection may be successfully taken or resisted, according to the strict mode of pleading, I need not now inquire." But the learned judge added, "The objection of multifariousness is one which should be taken *in limine*. \* \* \* The defendant may be subjected to the expense of taking copies of papers relating to matters with which he has no concern, and be kept before the court on the discussion of points in which he is not interested. If the defendant does not take the objection *in limine*, the court, considering the mischief as already incurred, does not, except in a special case, allow it to prevail at the hearing. All that the court, in this case, can do, is to protect the defendant from the costs incurred, if it should hereafter appear he has been improperly subjected to costs." (*Benson v. Hadfield*, 4 Hare, 39, 40.)

\* A demurrer to the specific relief prayed will not extend to the discovery sought, where the bill states a clear case for other relief, which can be given under the prayer for general relief, and to which the discovery sought may be ancillary. (*Deare v. Attorney General*, 1 Y. & C. Eq. Ex. 197.)

the mere purpose of compelling a discovery, without administering any relief, it was formerly conceived that though a plaintiff prayed by his bill relief to which he was not entitled, he might yet show a title to a discovery; and therefore, though a demurrer might hold to the relief, the defendant might notwithstanding be compellable to answer to the discovery, the bill being then considered as in effect a bill for a discovery merely.<sup>1</sup> This, however, has since been determined otherwise;<sup>2</sup> and where a plaintiff entitled to a discovery added to his bill a prayer for relief,<sup>3</sup> a demurrer has been allowed.<sup>4</sup> And where a defendant had demurred to the discovery sought by a bill, *for want of title in the plaintiff to require the discovery*, but had omitted to demur to the relief prayed, to which that discovery was merely incidental, it was conceived the demurrer must, in point of form, be overruled; for the demurrer, applying to the discovery only, admitted the title to relief, and consequently admitted the title to the discovery, which was only incidental to the relief.<sup>5</sup> But though a plaintiff may be entitled to the relief he prays, there may yet be reasons to induce a court of equity to forbear compelling a discovery.<sup>6</sup>

<sup>1</sup> See *Fry v. Penn*, 2 Bro. C. C. 280.

<sup>2</sup> See *Price v. James*, 2 Bro. C. C. 319.

<sup>3</sup> It is presumed, that in order to the defendant being thus able by demurrer wholly to protect himself against the interference of the court, it must appear from the manner in which the plaintiff states his case that he seeks the discovery as incidental to the relief. See cases in the next note.

<sup>4</sup> *Collis v. Swayne*, 4 Bro. C. C. 480; *Loker v. Rolle*, 3 Ves. 4; *Ryves v. Ryves*, 3 Ves. 343; 6 Ves. 63; 6 Ves. 686; 8 Ves. 3; *Gordon v. Simpkinson*, 11 Ves. 509; 17 Ves. 216; 1 Ves. & Bea. 539; 2 Ves. & Bea. 328; *Jones v. Jones*, 3 Meriv. 161; 3 Meriv. 502. This may probably have the effect of compelling

a plaintiff in a doubtful case to frame his bill for a discovery only in the first instance; and, having obtained it, by amending his bill to try the question whether he is also entitled to relief; which was formerly a frequent practice, and possibly a greater inconvenience.

<sup>5</sup> *Morgan v. Harris*, in Chan. 31 Oct. 1786, reported 2 Bro. C. C. 121; *Waring v. Mackreth*, Forrest, 129.

<sup>6</sup> A plaintiff may be entitled to relief in equity, independently of the discovery. 1 Swanst. 294. And there may be instances in which a defendant, although he should think proper to give the discovery, may yet demur to the relief. 2 Atk. 157; *Hodgkin v. Longden*, 8 Ves. 2; *Todd v. Gee*, 17 Ves. 273.

It remains therefore to consider the objections to a bill which are causes of demurrer to discovery only. These are: I. That the case made by the bill is not such in which a court of equity assumes a jurisdiction to compel a discovery; II. That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery; III. That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him, even for the purpose of discovery; IV. Although both plaintiff and defendant may have an interest in the subject, yet that there is not that privity of title between them which gives the plaintiff a right to the discovery required by his bill; V. That the discovery if obtained cannot be material; and, VI. That the situation of the defendant renders it improper for a court of equity to compel a discovery.\*

I. Where a bill prays relief, the discovery, if material to the relief, being incidental to it, a plaintiff showing a title to relief also shows a case in which a court of equity will compel a discovery, unless some circumstance in the situation of the defendant renders it improper. But where the bill is a bill of discovery merely, it is necessary for the plaintiff to show by his bill a case in which a court of equity will assume a jurisdiction for the mere purpose of compelling a discovery. This jurisdiction is exercised to assist the

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\* To a bill by legatees, whose legacies are charged on real estate, charging that the testator was tenant in fee simple, and not tenant in tail, of such real estate, as alleged by the defendant, or that only a small portion thereof was entailed, and seeking for a discovery and production of the deed of entail, a demurrer on the ground that it relates to the defendant's title will be allowed. (*Wilson v. Forster*, 1 Younge, 281.)

On the subject of discovery, the reader is referred to the learned works of Sir James Wigram and Mr. Hare.

administration of justice in the prosecution or defense of some other suit, either in the court itself or in some other court.<sup>1</sup> Where the object of a bill is to obtain a discovery to aid the prosecution or defense of a suit in the court itself, as the court has already jurisdiction of the subject, to state the suit depending is sufficient to give the court jurisdiction upon the bill of discovery. But if a bill is brought to aid, by a discovery, the prosecution or defense of any proceeding not merely civil in any other court, as an indictment or information, a court of equity will not exercise its jurisdiction to compel a discovery, and the defendant may demur.<sup>2</sup> And in the case of suits merely civil in a court of ordinary jurisdiction, if that court can itself compel the discovery required, a court of equity will not interfere.<sup>3</sup> Therefore, where a bill was filed for a discovery of the value of the respective real and personal estates of the inhabitants of a parish in which a church rate had been assessed, and of the application of the money collected, a demurrer was allowed; because the ecclesiastical court, to which the ordinary jurisdiction belonged, was capable of compelling the discovery.<sup>4</sup>

<sup>1</sup> See *Moodalay v. Moreton*, Dick. 652; s. c. 1 Bro. C. C. 469; *Bishop of London v. Fytche*, 1 Bro. C. C. 96; *Cardale v. Watkins*, 5 Madd. 18. A discovery has been compelled to aid the jurisdiction of a foreign court. *Crowe and others against Del Ris and Vallego*, in Chan. 11th July, 1769.\*

<sup>2</sup> 2 Ves. 398; and see *Thorpe v. Macauley*, 5 Madd. 218; *Shackell v. Macauley*, 2 Sim. & Stu. 79.

<sup>3</sup> 1 Atk. 288; 1 Ves. 205; *Anon.* 2 Ves. 451.

<sup>4</sup> *Dunn v. Coates*, 1 Atk. 288.

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\* In *Bent v. Young*, 9 Sim. 191, 192, Sir L. Shadwell, V. C., observed that the demurrer in this case was a speaking demurrer, and that the Lord Chancellor may very probably have overruled the demurrer on that ground, without at all entering into the consideration of the question whether the court will enforce discovery in aid of proceedings in a foreign court. (See 1 Paige, 287.)



II. A bill must show an interest in the plaintiff in the subject to which the required discovery relates,<sup>1</sup> and such an interest as entitles him to call on the defendant for the discovery. Therefore, where a plaintiff filed a bill for a discovery merely, to support an action which he alleged by his bill he intended to commence in a court of common law, although by this allegation he brought his case within the jurisdiction of a court of equity to compel a discovery, yet the court being of opinion that the case stated by the bill was not such as would support an action, a demurrer was allowed;<sup>2</sup> for unless the plaintiff had a title to recover in an action at law, supposing his case to be true, he had no title to the assistance of a court of equity to obtain from the confession of the defendant evidence of the truth of the case.<sup>3</sup> And upon a bill filed by a creditor, alleging that he had obtained judgment against his debtor, and that the defendant, to deprive him of the benefit of his judgment, had got into his hands goods of the debtor under pretense of a debt due to himself, and praying a discovery of the goods; the defendant demurred, because the plaintiff had not alleged that he had sued out execution, and because until he had so done, the goods were not bound by the judgment, and consequently the plaintiff had no title to the discovery; and the demurrer was allowed.<sup>4</sup>

III. Unless a defendant has some interest in the subject, he may be examined as a witness, and there-

<sup>1</sup> *Ramere v. Rawlins*, Rep. temp. Finch, 36; *Newman v. Holder*, Ib. 44; and see 2 Ves. 247; *Northleigh v. Luscombe*, Ambl. 612; and see *Wright v. Plumtree*, 3 Madd. 481.

<sup>2</sup> *Debbieg and Lord Howe*, in Chan. Hil. 1782, cited 3 Bro. C. C. 155; *Wallis v. Duke of Portland*, 3 Ves. 494;

*Lord Kensington v. Mansell*, 13 Ves. jr. 240.

<sup>3</sup> See *The Mayor of London v. Levy*, 8 Ves. 398.

<sup>4</sup> *Angell v. Draper*, 1 Vern. 399. But see *Taylor v. Hill*, 1 Eq. Cas. Abr. 132.

fore cannot in general be compelled to answer a bill for a discovery ;<sup>1</sup> \* for such a bill can only be to gain evidence, and the answer of the defendant cannot be read against any other person, not even against another defendant to the same bill.<sup>2</sup> But if the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, of course will not hold,<sup>3</sup> though the defendant has no interest ; and he can then only avoid answering the bill by plea or disclaimer. There seems to be an exception to the rule in the case of a corporation ; for as a corporation can answer no otherwise than under their common seal, and therefore, though they answer falsely, there is no remedy against them for perjury, it has been usual, where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary, to make their secretary or book-keeper or other officer a party ;<sup>4</sup> and a demurrer, because the bill showed no claim of interest in the defendant, has been in such case overruled.<sup>5</sup> So where bills have been filed to impeach deeds on the ground of fraud, attorneys who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made defendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery ; and no case appears in the books of a demurrer by such a party, because he had no claim of interest in the matter in

<sup>1</sup> *Steward v. E. I. Company*, 2 Vern. 380; *Dineley v. Dineley*, 2 Atk. 394; *Plummer v. May*, 1 Ves. 426; 1 Ves. jr. 294, note *e*; *Fenton v. Hughes*, 7 Ves. 287; 14 Ves. 252; *How v. Best*, 5 Madd. 19.

<sup>2</sup> 2 Vern. 380; 3 P. Wms. 311, and *Ib.* note *h*.

<sup>3</sup> 1 Ves. 426.

<sup>4</sup> *Anon.* 1 Vern. 117.

<sup>5</sup> *Wych v. Meal*, 3 P. Wms. 310; 7 Ves. jr. 289; 14 Ves. 252 *et seq.*; *Gibbons v. Waterloo Bridge Company*, 5 Pri. Ex. R. 491.

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\* *Jones v. Maund*, 3 Y. & C. Eq. Ex. 347.

question by the bill. Indeed an attorney under such circumstances, being brought as a party to the suit to a hearing, has been ordered to pay costs;<sup>1</sup> apparently on the same ground as costs were awarded against arbitrators in the cases of their misconduct before noticed.<sup>2</sup>

IV. Although both plaintiff and defendant may have an interest in the subject to which the discovery required is supposed to relate, yet there may not be that privity of title between them which can give the plaintiff a right to the discovery. Thus where a bill was filed by a person claiming to be lord of a manor, against another person also claiming to be lord of the same manor, and praying, amongst other things, a discovery in what manner the defendant derived title to the manor, the defendant demurred, because the plaintiff had shown no right to the discovery, and the demurrer was allowed.<sup>3</sup>

So where a bill was filed by a person claiming under a grant from the duchy of Lancaster, to be bailiff of a liberty within the duchy, with a right to all waifs estrays and other casualties within the liberty, and all fees and perquisites respecting the same, against the owner of an inn in the liberty, and his tenants, alleging that the inn-yard had been used as a common pound within the liberty for all waifs and strays and casualties; and that the tenant, under demise from the owner, had seized and taken all waifs and strays and other casualties; and received the fees and perquisites thereon; and required the owner to discover how he derived title thereto, and what leases or demises he had made thereof; a demurrer to the discovery was al-

<sup>1</sup> *Bennet v. Vade*, 2 Atk. 324; 1 Sch. & Lefr. 227; *Fenwick v. Reed*, 1 Meriv. 11.

<sup>2</sup> *Vide supra*, p. 254.

<sup>3</sup> *Adderley and Sparrow*, in Chan. Hil. 1779.

lowed.<sup>1</sup> In general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims.<sup>2</sup> And therefore, on a bill filed by an heir *ex parte materna* against a general devisee and executor, who had completed by conveyance to himself a purchase of real estate contracted for by the testator after the date of his will, alleging that there was no heir *ex parte paterna*, but that the devisee set up a title under a release from his father as heir *ex parte paterna* of the testator, and praying a conveyance to the plaintiff, and seeking a discovery in *what manner* the father claimed to be heir *ex parte paterna*, and the particulars of the pedigree under which he claimed, a demurrer to that discovery was allowed.<sup>3</sup>

V. As the object of the court in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted.\* If therefore

<sup>1</sup> Ritson v. Sir John Danvers, in Duchy C. of Lancaster, 28 Oct. 1787, by the Chancellor, assisted by Lord Loughborough and Mr. Justice Wilson. The cases of Sparrow v. Adderley, Hungerford v. Goreing, 2 Vern. 38; Stapleton v. Sherrard, 1 Vern. 212; Sherbone v. Clerk, 1 Vern. 273, and Welby and D. of Rutland, 2 Bro. P. C. 39, Toml. ed. were cited; and Lord Loughborough mentioned a case of Sir William Wake and Conyers before Lord Northington. See also Corporation of Dartmouth against Seale, in Chan. 18 Dec. 1717, rep. 1 Cox R. 416.

See also Ritson v. Sir John Danvers 24 Nov. 1790, on demurrer to an amended bill, Baron Thomson assisting the Chancellor; and Att. Gen. v. Sir John Danvers, 25 Jan. 1792; Grose, J. and Thomson B. assisting.

<sup>2</sup> Stroud v. Deacon, 1 Ves. 37; Budden v. Dore, 2 Ves. 445; Sampson v. Swettenham, 5 Madd. 16; Tyler v. Drayton, 2 Sim. & Stu. 309, and the cases therein cited; and see Chamberlain v. Knapp, 1 Atk. 52.

<sup>3</sup> Ivy v. Kekewich, in Ch. 27th July, 1795, rep. 2 Ves. jr. 679.

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\* A bill may be sustained for a discovery in aid of an action at law, and for an injunction to restrain the defendants at law in the mean time

the plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he prays relief, or does not show a title to sue the defendant in some other court,<sup>1</sup> or that he is actually involved in litigation with the defendant, or liable to be so, and does not also show that the discovery which he prays is material to enable him to support or defend a suit, he shows no title to the discovery, and consequently a demurrer will hold.<sup>2</sup> \* Therefore where a bill filed by a mortgagor against a mortgagee to redeem, sought a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed. For as there was no trust declared upon the mortgage, it was not material to the relief prayed whether there was any trust reposed in the defendant or not.<sup>3</sup> So

<sup>1</sup> Debbieg and Lord Howe, in Ch. Hil. 1782, cited 3 Bro. C. C. 115; *Wallis v. Duke of Portland*, 3 Ves. 494; *The Mayor of London v. Levy*, 8 Ves. 398; *Lord Kensington v. Mansell*, 13 Ves. jr. 240.

<sup>2</sup> See cases cited *supra*, note 1; and see 1 Ves. 249; 1 Bro. C. C. 97; and *Askam v. Thompson*, 4 Pri. Exch. R. 330; *Cardale v. Watkins*, 5 Madd. 19. <sup>3</sup> *Harvey v. Morris*, Rep. tem. Finch, 214.

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“from proceeding to apply for judgment as in the case of a nonsuit, or from taking the cause to trial by proviso,” although it is not clear that the action can be maintained, but yet there is considerable ground for argument in support of the action in a court of law. (*Thomas v. Tyler*, 3 Y. & C. Eq. Ex. 255.)

A colonial or foreign judgment cannot be questioned in the courts of this country; and therefore a bill for a discovery, and a commission to examine witnesses abroad, in aid of the plaintiff's defense to an action brought in this country on a colonial or foreign judgment, is demurrable. (*Martin v. Nichols*, 3 Sim. 458.)

\* Where a bill is filed for a commission to examine witnesses, and for a discovery in aid of a defense at law to an action for libel, it is necessary that the case sought to be made out in equity should constitute a defense at law.

It is sufficient, however, to refer to the pleas at law by the words, “as by the said pleas, reference being thereunto had, will appear:” for that will enable the court to call for the pleadings at law. (*Macaulay v. Shackell*, 1 Bligh [N. S.] 96.)

where a bill was filed by a lord of a borough, praying, amongst other things, a discovery whether a person applying to be admitted tenant was a trustee, the defendant demurred,<sup>1</sup> it being wholly immaterial to the plaintiff's case whether the defendant was a trustee or not. And where a bill was brought for a real estate, and sought discovery of proceedings in the ecclesiastical court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the ecclesiastical court being immaterial to the plaintiff's case.<sup>2</sup> Again, where a bill to establish an agreement for separate maintenance for the defendant's wife, prayed a discovery of ill treatment of the wife, to make her recede from the agreement, the defendant demurred to the discovery,<sup>3</sup> which could not be material to the case made by the bill. But in general, if it can be supposed that the discovery may in any way be material to the plaintiff in the support or defense of any suit, the defendant will be compelled to make it.<sup>4</sup> Thus where a bishop filed a bill against the patron of a living and a clerk presented by him, to discover whether the clerk had given a bond of resignation, and the patron demurred, because the discovery either was such as might subject him to penalties and forfeitures, or it was immaterial to the plaintiff, the demurrer was overruled; the court declaring a clear opinion that the bond was not simoniacal, but conceiving that the discovery might be material to support a defense to a *quare impedit*, upon this ground, "that the bond put the clerk under the power of the patron, in derogation of the rights of the ordinary."<sup>5</sup>

<sup>1</sup> Lord Montague v. Dudman, 2 Ves. 396.

<sup>2</sup> 2 Atk. 388.

<sup>3</sup> Hincks v. Nelthrope, 1 Vern. 204.

<sup>4</sup> 1 Ves. 205; and see Richards v. Jackson, 18 Ves. 472; 1 Madd. 192; Att. Gen. v. Berkeley, 2 Jac. & W. 291.

<sup>5</sup> Bishop of London against Ffytche,

VI. The situation of a defendant may render it improper for a court of equity to compel a discovery, either because the discovery may subject the defendant to pains or penalties, or to some forfeiture, or something in the nature of a forfeiture; or it may hazard his title in a case where in conscience he has at least an equal right with the person requiring the discovery, though that right may not be clothed with a perfect legal title.<sup>1</sup>

It is a general rule that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of the punishment.<sup>2</sup> If therefore a bill requires an answer which may<sup>3</sup> subject the defendant to any pains or penalties, he may demur to so much of the bill.<sup>4</sup> As if a bill charges anything which, if confessed by the answer, would subject the defendant to any criminal prosecution,<sup>5</sup> \* or to any particular

in Chan. Trin. 1781. In consequence of this decision, an answer was put in admitting the bond; and a *quare impedit* being brought, it was finally determined in the House of Lords against the patron, and he consequently lost his presentation. Perhaps, therefore, the overruling the demurrer was in contradiction to the principles on which courts of equity have proceeded in the cases considered under the next head. See the cases reported in 1 Bro. C. C. 96, and Cunningham's Law of Simony. See also Grey v. Hesketh, Ambl. 268.

<sup>1</sup> See Ivy v. Kekewich, 2 Ves. jr. 679; Lord Shaftesbury v. Arrowsmith, 4 Ves.

66; 13 Ves. 251; 15 Ves. 378; Wright v. Plumtree, 3 Madd. 481; Glegg v. Legh, 4 Madd. 193.

<sup>2</sup> 2 Ves. 245, and the authorities referred to in note; 1 Eq. Cas. Abr. 131; 11 Ves. 525; 2 Swanst. 214.

<sup>3</sup> 1 Atk. 539; 1 Swanst. 305.

<sup>4</sup> See Billing v. Flight, 1 Madd. 230. And it may be observed that such a demurrer will not be regarded as any admission of the truth of the charge. 16 Ves. 69.

<sup>5</sup> East India Company v. Campbel, 1 Ves. 246; Chetwynd v. Lindon, 2 Ves. 451; Cartwright v. Green, 8 Ves. 405; 14 Ves. 65.

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\* A bill of discovery is demurrable where the whole object of it is to obtain a discovery of an illegal assault and imprisonment, with the view of subjecting the defendant to penal consequences. (Glynn v. Houston, 1 Keen, 329.) And it would seem that a bill of discovery cannot be sustained in aid of an action for a mere personal tort. (Ib. 337.)

The court will not compel a defendant to answer allegations where

penalties, as a usurious contract,<sup>1</sup> maintenance,<sup>2</sup> champerty,<sup>3</sup> simony.<sup>4</sup> And in such cases, if the defendant is not obliged to answer the facts, he need not answer the circumstances, though they have not such an immediate tendency to criminate.<sup>5</sup>

If the plaintiff is alone entitled to the penalties, and expressly waives them by his bill, the defendant shall be compelled to make the discovery; for it can no longer subject him to a penalty.<sup>6</sup> As if a rector or impropiator or vicar files a bill for tithes, he may waive the penalty of the treble value,<sup>7</sup> to which he is entitled by the statute of 2 & 3 Edward VI, and thus become entitled to a discovery of the tithes subtracted. And though a discovery may subject a defendant to penalties to which the plaintiff is not entitled, and which he consequently cannot waive, yet if the defendant has expressly covenanted not to plead or demur to the discovery sought, which is the common case with respect to servants of the East India Company, he shall be compelled to answer.<sup>8</sup> \* Where, too,

<sup>1</sup> *Fenton v. Blomer*, Tothil, 135; *Earl of Suffolk v. Green*, 1 Atk. 450; 2 Atk. 393; 22 Vin. Abr. Usury, Q. 4; *Whitmore v. Francis*, 8 Pri. Ex. R. 616.

<sup>2</sup> *Penrice v. Parker*, Rep. temp. Finch, 75; *Sharp v. Carter*, 3 P. Wms. 375; *Wallis v. Duke of Portland*, 3 Ves. 494.

<sup>3</sup> See 2 Sim. & Stu. 252.

<sup>4</sup> *Att. Gen. v. Sudell*, Prec. in Chan.

214; 1 Meriv. 401. But see p. 288, note 5.

<sup>5</sup> 1 Ves. 247, 248; 19 Ves. 227, 228.

<sup>6</sup> *Lord Uxbridge v. Staveland*, 1 Ves. 56; and see 1 Vern. 129; *Bullock v. Richardson*, 11 Ves. 373.

<sup>7</sup> *Anon.* 1 Vern. 60.

<sup>8</sup> *South Sea Comp. v. Bumsted*, 1 Eq. Cas. Abr. 77; *E. I. Comp. v. Atkins*, 2 Ves. 108; and see *Paxton v. Douglas*, 16 Ves. 239.

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there is a reasonable probability that by so doing he would subject himself to an indictment for a fraud. (*Maccallum v. Turton*, 2 Y. & J. 183.)

Where a bill seeks a discovery of transactions which would subject the defendant to a criminal prosecution under a statute, the defendant need not plead the statute, but may demur to the bill. (*Fleming v. St. John*, 2 Sim. 181.)

\* A person who has been duly admitted a broker or agent by the



a person by his own agreement subjects himself to a payment in the nature of a penalty if he does a particular act, a demurrer to discovery of that act will not hold.<sup>1</sup> Thus, where a lessee covenanted not to dig loam, clay, sand, or gravel, except for the purpose of building on the land demised, with a proviso that if he should dig any of those articles for any other purpose, he should pay to the lessor twenty shillings a cart-load, and he afterwards dug great quantities of each article; upon a bill for discovery of the quantities, waiving any advantage of possible forfeiture of the term, a demurrer of the lessee, because the discovery might subject him to a payment by way of penalty, was overruled.<sup>2</sup>

And a party shall not protect himself against relief in a court of equity by alleging that if he answers the bill filed against him, he must subject himself to the consequences of a supposed crime, though the court will not force him by his own oath to subject himself to punishment; and therefore in the case of a bill to inquire into the validity of deeds upon a suggestion of forgery, the court has entertained jurisdiction of the

<sup>1</sup> See *Morse v. Buckworth*, 2 Vern. against Cole, in Chan. Hil. Vacation, 443; *E. I. Comp. v. Neave*, 5 Ves. 173. 1779.

<sup>2</sup> Richards against Cole, or Brodrepp

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mayor and aldermen of the city of London must answer a bill of discovery in aid of an action for misconduct brought against him by his employer, although the discovery will subject him to penalties and to an indictment for perjury; for otherwise the bond given and the oath taken by such persons on their admission, instead of securing their honesty, would only serve as a screen to them in the commission of the grossest frauds.

And a person who has not been admitted a broker or agent, but acts as one, must answer, although he may thereby subject himself to a penalty for acting without having been admitted. (*Green v. Weaver*, 1 Sim.

cause; and though it has not obliged the party to a discovery of any fact which might tend to show him guilty of the crime, has directed an issue to try whether the deeds were forged.<sup>1</sup>

It should seem that a demurrer will also hold to any discovery which may tend to show the defendant guilty of any moral turpitude, as the birth of a child out of wedlock.<sup>2</sup> But a mother has been compelled to discover where her child was born, though it might tend to show the child to be an alien;<sup>3</sup> for that was not a discovery of any illegal act, or of any act which could affect the character of the defendant.<sup>4</sup>

A demurrer will likewise hold to a bill requiring a discovery which may subject the defendant to any forfeiture<sup>5</sup> of interest: as if a bill is brought to discover whether a lease has been assigned without license;<sup>6</sup> or whether a defendant, entitled during widowhood,<sup>7</sup> or liable to forfeiture of a legacy in case of marriage without consent,<sup>8</sup> is married; or to discover any matter which may subject a defendant entitled to any office or franchise to a *quo warranto*.<sup>9</sup> But if the plaintiff is alone entitled to the benefit of the forfeiture, and expressly waives<sup>10</sup> it by the bill, as in the case of a bill for discovery of waste,<sup>11</sup> a demurrer will not hold; for the waiver gives the court a ground of equity to award an injunction, if the plaintiff sues for the forfeiture.<sup>12</sup> If

<sup>1</sup> 2 Ves. 246. See also 1 Eq. Cas. Abr. 131, p. 11; Att. Gen. v. Sudell, Prec. in Chan. 214.

<sup>2</sup> Parker, 163; 2 Ves. 451; Franco v. Bolton, 3 Ves. 368; King v. Burr, 3 Meriv. 698.

<sup>3</sup> Att. Gen. v. Duplessis, 2 Ves. 287; Ib. 494.

<sup>4</sup> 1 Meriv. 400.

<sup>5</sup> Tothill, 69.

<sup>6</sup> Lord Uxbridge v. Staveland, 1 Ves. 56.

<sup>7</sup> Monnins v. Monnins, 2 Chan. Rep. 68.

<sup>8</sup> Chauncey v. Tahourden, 2 Atk. 392; Chancey v. Fenhoulet, 2 Ves. 265.

<sup>9</sup> 1 Eq. Cas. Abr. 131, p. 10.

<sup>10</sup> 1 Ves. 56; see above, p. 290, note 6.

<sup>11</sup> 2 Atk. 393; Att. Gen. v. Vincent, 2 Eq. Cas. Abr. 378; s. c. cited Com. R. 664.

<sup>12</sup> 1 Ves. 56.

the discovery sought is of a matter which would show the defendant incapable of having any interest or title ; as whether a person claiming a real estate under a devise was an alien, and consequently incapable of taking by purchase ;<sup>1</sup> a demurrer will not hold. And where a devise over of an estate in case of marriage was considered as a conditional limitation, and not as a forfeiture, a demurrer to a bill for a discovery of marriage was overruled.<sup>2</sup>

A defendant may in the same manner demur to a discovery which may subject him to anything in the nature of a forfeiture ;<sup>3</sup> as where a discovery was sought whether the defendant was educated in the Popish religion, by which he might have incurred the incapacities in the statute 11 & 12 Wm. III ;<sup>4</sup> or whether a clergyman was presented to a second living, which avoided the first.<sup>5</sup>

But where a person against whom a commission of bankrupt had issued, had brought actions against the assignees under the commission, disputing its validity, and particularly insisting that he had not been a trader within the meaning of the bankrupt laws, and in those actions the validity of the commission had been established ; and the assignees filed a bill against him, stating these facts, and that being harassed by these actions, and threatened with other actions, they were not able to distribute the effects under the commission, and therefore praying a perpetual injunction to restrain further actions, and requiring a discovery, amongst

<sup>1</sup> Att. Gen. *v.* Duplessis, Parker, 144.

<sup>2</sup> 2 Atk. 393 ; *Lucas v. Evans*, 3 Atk. 260 ; 2 Ves. 265.

<sup>3</sup> 3 Atk. 457.

<sup>4</sup> *Jones v. Meredith*, Com. 661 ; and see *Ib.* 664 ; *Smith v. Read*, 3 Bac. Abr. 800 ; 1 Atk. 527 ; 2 Ves. 394. The 18

Geo. III, c. 60, the 31 Geo. III, c. 32, and the 43 Geo. III, c. 39, do not entirely remove these incapacities. But they are removed by the 10 Geo. IV, c. 7, s. 23.

<sup>5</sup> *Boteler v. Allington*, 3 Atk. 453.

other things, of acts of trading, a demurrer to that discovery was overruled.<sup>1</sup>

If a defendant has in conscience a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title; and if the matter appears clearly on the face of the bill, a demurrer will hold.<sup>2</sup> The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim.<sup>3</sup> Upon the same principle a jointress may in many cases demur to a bill filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, the jointure, and the facts appear sufficiently on the face of the bill; though ordinarily advantage is taken of this defense by way of plea.<sup>4</sup>

This arises from that singularity in the jurisprudence of this country, produced by the establishment of the extraordinary jurisdiction of courts of equity distinct from the ordinary jurisdictions, noticed in a former page, and necessarily creating a distinction between legal and equitable rights.<sup>5</sup> Where the courts of equity are called upon to administer justice upon grounds of equity against a legal title, they allow a superior strength to the legal title when the rights of the parties are in conscience equal; and where a legal title may be enforced in a court of ordinary jurisdiction to the prejudice of an equitable title, the courts of

<sup>1</sup> *Chambers v. Thomson*, 1 Nov. 1793, rep. 4 Bro. C. C. 434, affirmed on rehearing, March, 1794. See *Protector and Lord Lumley*, Hardr. 22. See also *Selby v. Crew*, 1 Anstr. 504.

<sup>2</sup> See *Glegg v. Legh*, 4 Madd. 193.

<sup>3</sup> 2 Ves. jr. 458; *Sweet v. Southcote*, 2 Bro. C. C. 66.

<sup>4</sup> *Chamberlain v. Knapp*, 1 Atk. 52; 2 Ves. 450; 2 Ves. 662.

<sup>5</sup> 2 Ves. 573, 574.

equity will refuse assistance to the legal against the equitable title where the rights in conscience are equal.

If the grounds on which a defendant might demur to a particular discovery appear clearly on the face of the bill, and the defendant does not demur to the discovery, but, answering the rest of the bill, declines answering to so much, the court will not compel him to make the discovery.<sup>1</sup> But in general, unless it appears clearly by the bill that the plaintiff is not entitled to the discovery he requires, or that the defendant ought not to be compelled to make it, a demurrer to the discovery will not hold; and the defendant, unless he can protect himself by plea, must answer.

Where the sole object of a bill is to obtain a discovery, some grounds of demurrer, which if the bill prayed relief would extend to discovery as well as to the relief, will not hold. Thus a demurrer to a bill for a discovery merely will not hold for want of parties, for the plaintiff seeks no decree; nor, in general, for want of equity in the plaintiff's case for the same reason; nor because the bill is brought for the discovery of part of a matter, for that is merely a demurrer because the discovery would be insufficient. But it should seem a demurrer would hold to a bill for discovery of several distinct matters against several distinct defendants. For though a defendant is always eventually paid his costs upon a bill of discovery, if both parties live, and the plaintiff by amendment of his bill does not extend it to pray relief, yet the court ought not to permit the defendant to be put to any unnecessary expense, as either the plaintiff or defendant may die pending the suit.<sup>2</sup>

<sup>1</sup> See *Wrottesley v. Bendish*, 3 P. Wms. 235; 1 Meriv. 401; see below, page 297.  
<sup>2</sup> See next page, and notes 2 and 3.  
 Chap. II, sect. 2, part 3. r

After an answer to a bill of discovery, when time for excepting to it as insufficient is expired, the defendant may apply for costs as a matter of course,<sup>1</sup> unless the plaintiff shall in the mean time have obtained an order to amend his bill, which may be done either to obtain a fuller discovery, or, if the case appearing on the answer will warrant the proceeding, by adding to the bill a prayer for relief.<sup>2</sup>

Demurrers have hitherto been noticed with reference only to original bills. As every other kind of bill is a consequence of an original bill, many of the causes of demurrer which will apply to an original bill will also apply to every other kind; but the peculiar form and object of each kind afford distinct causes of demurrer to each. Thus if a bill of revivor\* does not show a sufficient ground for reviving the suit,<sup>3</sup> or any part of it,<sup>4</sup> either by or against<sup>5</sup> the person by or against whom it is brought, the defendant may by demurrer show cause against the revival.<sup>6</sup> Indeed though

<sup>1</sup> See 4 Ves. 746; *Hewart v. Semple*, 5 Ves. 86; *Noble v. Garland*, 1 Madd. 344. But it seems that the time within which the exceptions must be filed has latterly, under special circumstances, been extended. See *Baring v. Prinsep*, 1 Madd. 526.

<sup>2</sup> On this subject see *Butterworth v. Bailey*, 15 Ves. 358.

<sup>3</sup> *Humphreys v. Incledon*, Dick. 38; *Harris v. Pollard*, 3 P. Wms. 348.

<sup>4</sup> 1 Eq. Cas. Abr. 3, 4.

<sup>5</sup> *University College v. Foxcroft*, 2 Ch. Rep. 244.

<sup>6</sup> 3 P. Wms. 348.

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\* Where a bill is filed by a husband and wife, and the cause is heard on farther directions, after the death of the wife, in the absence of her personal representative, and afterwards her husband dies, and thereupon a bill of revivor is filed against his personal representative, a demurrer to such a bill on the ground that the personal representative of the wife is not before the court will be overruled; for the plaintiff in the bill of revivor is entitled to have the suit placed in the same plight and condition in which it was at the time of the abatement in respect of which the revivor is sought; and if the proceedings were then imperfect, it is not the office of demurrer to a bill of revivor to correct the imperfection. (*Metcalfe v. Metcalfe*, 1 Keen, 74.)

the defendant does not demur, yet if the plaintiff does not show a title to revive, he will take nothing by his suit at the hearing.<sup>1</sup> A demurrer will also in many cases hold to a bill of revivor brought singly for costs;<sup>2</sup> the court in general not permitting a suit to be revived for that purpose only, except where the costs have been actually taxed before the abatement happened.<sup>3</sup> \*

If a supplemental bill is brought upon matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur.<sup>4</sup> If a bill is brought as a supplemental bill upon matter arising subsequent to the time of filing the original bill against a person who claims no interest arising out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill, may also demur, especially if the bill prays that he may answer the matters charged in the former bill. These, however, are grounds of demurrer arising rather from the plaintiff's having mistaken his remedy, than from his being without remedy.

A cross-bill having nothing in its nature different from an original bill, with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems no cause of de-

<sup>1</sup> 3 P. Wms. 348.

<sup>2</sup> 2 Eq. Cas. Abr. 3; 2 Ves. jr. 315; 10 Ves. 572; Jupp v. Geering, 5 Madd. 375.

<sup>3</sup> Hall v. Smith, 1 Bro. C. C. 438; Morgan v. Scudamore, 2 Ves. jr. 313; S. C. 3 Ves. 195; Lowten v. Mayor and Commonalty of Colchester, 2 Meriv. 113; 3 Madd. 377.

<sup>4</sup> Baldwin v. Mackown, 3 Atk. 817; 2 Madd. 387; or, if the matter should have arisen subsequently, but be immaterial, the defendant may also demur. See Milner v. Lord Harewood, 17 Ves. 144; Adams v. Dowding, 2 Madd. 53; Ibid. 388.

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\* A bill of revivor cannot be filed merely for costs by the personal representative of a defendant to a bill which has been dismissed with costs. (Andrews v. Lockwood, 15 Law J. 285, V. C. E.)

murrer to such a bill which will not equally hold to an original bill. And a demurrer for want of equity will not hold to a cross-bill filed by a defendant in a suit against the plaintiff in the same suit touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court, without being put to show a ground of equity to support its jurisdiction,<sup>1</sup> a cross-bill being generally considered as a defense.<sup>2</sup>

A bill filed by the direction of the court for the purpose of obtaining its decree touching some matter not in issue by a former bill, or not in issue between the proper parties, does not seem liable to any peculiar cause of demurrer. Indeed, being exhibited by order of the court upon hearing of another cause, there is little probability that such a bill should be liable, in substance, to any demurrer.

The constant defense to a bill of review for error apparent upon a decree has been said to be by plea of the decree, and demurrer against opening the enrollment.<sup>3</sup> There seems, however, no necessity for pleading the decree, if fairly stated in the bill: the books of practice contain the forms of a demurrer only to such a bill, and there are cases accordingly.<sup>4</sup>

On argument of a demurrer to a bill of review where several errors in the decree have been assigned, if the plaintiff should prevail only in one, the demurrer

<sup>1</sup> *Doble v. Potman*, Hardr. 160; 1 Eden, 190.

<sup>2</sup> 3 Atk. 812.

<sup>3</sup> *Dancer v. Evett*, 1 Vern. 392; *Smith v. Turner*, 1 Vern. 273; 2 Atk. 534. See also 3 Atk. 627; *O'Brien v. O'Connor*, 2 Ball & B. 146.

<sup>4</sup> *Slingsby v. Hale*, 1 Cas. in Chan. 122; 1 P. Wms. 139; and see *Jones v. Kenrick*, 5 Bro. P. C. 244; and *Ib.* 248; in which case the defendant appears to

have pleaded the decree enrolled in bar of the first bill, which did not state the decree, but to have demurred alone to the bill of review. And in *Helbut and Philpot*, in the House of Lords, 11 March, 1725, the defendant demurred alone to a bill of review, and the demurrer was allowed, and the order affirmed by the Lords; and see *Denny v. Filmore*, 1 Vern. 135; s. c. 2 Freeman, 172.



must be overruled, as one error will be sufficient to open the enrollment; and on argument of a demurrer to a bill of review for error apparent in the decree, the court has ordered the defendant to answer, saving the benefit of the demurrer to the hearing, and on the hearing has finally allowed the demurrer.<sup>1</sup>

Where the decree has been pronounced above twenty years, the length of time is good cause of demurrer.<sup>2</sup>

Where any matter beyond the decree is to be offered against opening the enrollment, that matter must be pleaded;<sup>3</sup> and it has been said that length of time must be pleaded to a bill of review, and that otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like.<sup>4</sup> A bill of review upon the discovery of new matter, and a supplemental bill of the same nature, being exhibited only by leave of the court,\* the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at

<sup>1</sup> Denny *v.* Filmer, 2 Freeman, 172.

<sup>2</sup> Edwards *v.* Carroll, 2 Bro. P. C. 98, Toml. ed.; and see Smythe *v.* Clay, 4 Bro. C. C. 539, n.; s. c. 1 Bro. P. C. 453, Toml. ed.; s. c. Ambl. 645.

<sup>3</sup> See Hartwell *v.* Townsend, 2 Bro. P. C. 107, Toml. ed.

<sup>4</sup> Gregor *v.* Molesworth, 2 Ves. 109. See, however, Sherrington *v.* Smith, 2 Bro. P. C. 62, Toml. ed.; Gorman *v.* M'Culloch, 5 Bro. P. C. 597, Toml. ed. see 3 P. Wms. 287, note B, and *post*, p. 306, as to a demurrer on the ground of

length of time; and it should seem that if the plaintiff can allege any exception to a positive rule, he ought to do so by his bill. In Lytton *v.* Lytton (4 Bro. C. C. 441), the exception was stated in the bill, and admitted by the answer. If length of time must be pleaded, yet the plaintiff can have no benefit of exception not stated in the bill, unless it should be required that the plea should be supported by averments negating every possible exception, to which there seem to be great objections.

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\* See note \* to p. 300.

the time leave is given to bring the bill.<sup>1</sup> Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill. If upon argument of a demurrer to a bill of review the demurrer is allowed, the order allowing it, being enrolled, is an effectual bar to another bill of review.<sup>2</sup>

If upon the face of a bill to carry a decree into execution, the plaintiff appears to have no right to the benefit of the decree, the defendant may demur.

Bills in the nature of bills of revivor and supplement are liable to objections of the same sort as may be made to the kinds of bills of whose nature they partake.

In addition to the several particular causes of demurrer applicable to particular kinds of bills, it may be observed that any irregularity in the frame of a bill of any sort may be taken advantage of by demurrer. Thus if a bill is brought contrary to the usual course of the court, a demurrer will hold.<sup>3</sup>\* As where, after a decree directing incumbrances to be paid according to priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him by way of priority over

<sup>1</sup> 2 Atk. 40. See what is stated in regard to a mere supplemental bill, 17 Ves. 148, 149; 2 Madd. 61; and see above, 297, note 4.

<sup>2</sup> See *Denny v. Filmer*, 2 Cas. in Chan. 133; S. C. 1 Vern. 135, and *Ib.* 417; *Pitt v. Earl of Arglass*, *Ib.* 441; *Woots v. Tucker*, 2 Vern. 125.

<sup>3</sup> See *Wortley v. Birkhead*, 3 Atk. 809; S. C. 2 Ves. 571; *Lady Granville v. Ramsden*, Bunb. 56; *Earl of Darlington v. Pulteney*, 3 Ves. 386; *Fletcher v. Tollett*, 5 Ves. 3; *Ogilvie v. Herne*, 13 Ves. 563; *Maule v. Duke of Beaufort*, 1 Russ. 349.

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\* For an instance of a demurrer to a bill on the ground of its having been filed without leave of the court, see *Bainbrigge v. Baddeley*, 10 Jur. 765.

the demands of some of the defendants.' This was a bill to vary a decree,\* and yet was neither a bill of review, nor a bill in nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a decree,<sup>2</sup> unless the decree has been obtained by fraud.<sup>3</sup> So if a supplemental bill is brought against a person not a party to the original

<sup>1</sup> 3 Atk. 811.

<sup>2</sup> Arg<sup>do</sup> 3 Atk. 811; Read v. Ham-  
bey, 1 Cas. in Chan. 44; s. c. 2 Freem.  
179; 13 Ves. 564.

<sup>3</sup> Arg<sup>do</sup> 3 Atk. 811; Galley v. Baker,  
Cas. t. Talb. 199; Manaton v. Moles-  
worth, 1 Eden, 25; 13 Ves. 564.

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\* Where a bill is filed against executors and the supposed representative of a deceased executor, praying for an administration of the testator's estate, and impeaching an account alleged to have been fraudulently settled between the surviving executors and the deceased executor; but it appears, at the hearing, that the representative of the deceased executor is not a party to the suit; and the decree therefore directs that the account settled with the deceased executor shall not be disturbed; and then a bill, purporting to be a supplemental bill, is filed, bringing before the court the personal representative of the deceased executor and the assignees of a bankrupt executor, a demurrer to so much of the bill as seeks for an account of the receipts of the deceased executor, even though put in by the assignees of the bankrupt executor, will be allowed; because, to that extent, the bill is not supplemental, but is an original bill seeking to vary the former decree. (*Wilson v. Todd*, 1 My. & Cr. 42.)

But where a testator directs his estate to be converted, and invested for certain persons for life, with remainder over; and the executors, instead of converting, permit the successive tenants for life to enjoy the leasehold part of his estate until the expiration of the terms; and the remainder-men file a bill against the representative of the executors, after the death of the tenants for life, for an account and distribution; but in consequence of representations made by the representatives of the executors in ignorance of the circumstances, the remainder-men waive an account, and a decree is made for distributing the residue; and afterwards the remainder-men discover the breach of trust in respect of the leaseholds, and file a supplemental bill for relief, the court, notwithstanding the former decree, will order the representatives of the executors to pay what was the value of the lease at the time of the testator's death. And this will be the case, even though the title to the lease was bad, if no advantage was taken of the badness of the title by the owners of the property. (*Mehrtens v. Andrews*, 3 Beav. 72.)

bill, praying that he may answer the original bill, and no reason is suggested why he could not be made a party to the original bill by amendment, he may demur.<sup>1</sup> If an irregularity arises in any alteration of a bill by way of amendment, it may also be taken advantage of by demurrer. As if a plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill,<sup>2</sup> which consequently ought to be the subject of a supplemental bill, or bill of revivor. But if a matter arisen subsequent to the filing of the bill, and properly the subject of a supplemental bill, is stated by amendment, and the defendant answers the amended bill, it is too late to object to the irregularity at the hearing.<sup>3</sup> For as the practice of introducing by supplemental bill matter arisen subsequent to the institution of a suit has been established merely to preserve order in the pleadings, the reason on which it is founded ceases when all the proceedings to obtain the judgment of the court have been had without any inconvenience arising from the irregularity.<sup>4</sup>

Having thus considered the several grounds of demurrer, it may be proper to observe some particulars with respect to the frame of demurrers, the manner in which they are offered to the court, and the manner in which their validity may be determined, or their consequences avoided.

A demurrer must be signed by counsel;<sup>5</sup> but is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill.<sup>6</sup> It is therefore considered that the defendant

<sup>1</sup> *Baldwin v. Mackown*, 3 Atk. 817.

<sup>2</sup> 1 Atk. 291; *Pilkington v. Wignall*, 2 Madd. 240.

<sup>3</sup> *Belchier against Pearson*, at the Rolls, 13 July, 1782.

<sup>4</sup> See above, p. 297.

<sup>5</sup> See Ord. in Chan. 172, Ed. Bea.

<sup>6</sup> 2 Ves. 247; 1 Madd. 236.

may, by advice of counsel, upon the sight of the bill only, be enabled to demur thereto ;<sup>1</sup> and for this reason it is always made the special condition of an order giving the defendant time to demur, plead, or answer to the plaintiff's bill, that he shall not demur alone. Whenever, therefore, the defendant has obtained an order for time, and is afterwards advised to demur, he must also plead to or answer some part of the bill.<sup>2</sup> It has been held that, answering to some fact immaterial to the cause, and denying combination,<sup>3</sup> do not amount to a compliance with the terms of such an order ; and therefore, upon motion, a demurrer accompanied by such an answer has been discharged.<sup>4</sup> This rule has been probably established under a notion that time is not necessary to determine whether a defendant may demur to a bill or not, and a supposition that a demurrer may be filed merely for delay. But whether a bill may be demurred to is sometimes a subject of serious and anxious consideration ; and the preparation of a demurrer may require great attention, as if it extends in any point too far, it must be overruled.

<sup>1</sup> Ord. in Chan. 172, Ed. Bea.

<sup>2</sup> If the defendant should apply for time to answer generally, it would be presumed that his case does not require the usual indulgence to the extent mentioned in the text ; and the order would be drawn up accordingly (see 10 Ves. 448 ; 1 Ves. & Bea. 186), and he would be bound to answer (10 Ves. 446) ; but a plea would be considered within the meaning of this term (see *Roberts v. Hartley*, 1 Bro. C. C. 56 ; *De Minkuitz v. Udney*, 16 Ves. 355 ; *Barber v. Crawshaw*, 6 Madd. 284), unless, perhaps, it were of a description not required to be put in upon oath (see *Phillips v. Gibbons*, 1 Ves. & Bea. 184 ; and see *Anon.* 2 P. Wms. 464 ; 3 P. Wms. 81) ; but the defendant would not be allowed to demur alone (*Kenrick v. Clayton*, 2 Bro. C. C. 214 ; s. c. *Dick*. 685), or even to answer and demur (*Taylor v. Milner*, 10

Ves. 444 ; *Mann v. King*, 18 Ves. 297), except under peculiar circumstances, and upon leave granted by the court, on a special application for that purpose. See *Bruce v. Allen*, 1 Madd. 556 ; *Sherwood v. Clark*, 9 Pri. Ex. R. 259.

<sup>3</sup> As to the necessity of denying a general charge of combination, see *supra*, p. 140. The charge of combination, in order to be material, with the view of preventing a demurrer for want of equity by parties not interested, must be specific. *Smith v. Snow*, 3 Madd. 10.

<sup>4</sup> *Stephenton v. Gardiner*, 2 P. Wms. 286 ; 4 Vin. Abr. 442 ; *Lee v. Pascoe*, 1 Bro. C. C. 78 ; and see *Kenrick v. Clayton*, 2 Bro. C. C. 214 ; s. c. *Dick*. 685 ; *Lansdown v. Elderton*, 8 Ves. 526 ; *Tomkin v. Lethbridge*, 9 Ves. 178 ; 10 Ves. 446, 447, 448 ; 2 Ves. & B. 123.

Great inconvenience therefore may arise from a strict adherence to this rule. For it often happens that a defendant cannot answer any material part of the bill without overruling his demurrer; it being held that if a defendant answers to any part of a bill to which he has demurred, he waives the benefit of the demurrer;<sup>1</sup> or if he pleads to any part of a bill before demurred to, the plea will overrule the demurrer.<sup>2</sup> For the plaintiff may reply to a plea or answer, and thereupon examine witnesses and hear the cause; but the proper conclusion of a demurrer is to demand the judgment of the court whether the defendant ought to answer to so much of the bill as the demurrer extends to, or not.<sup>3</sup> The condition that the defendant shall not demur alone, ought therefore, perhaps, to be considered liberally; and it has been formerly said that the court will not incline to discharge a demurrer if the defendant denies combination, only where he cannot answer further without overruling his demurrer.<sup>4</sup> Indeed, any material answer must in many cases overrule the demurrer; so that giving a defendant time to demur, plead, or answer, not demurring alone, is often in effect giving leave to do a thing, but clogging the permission with a condition which makes it nugatory; and though the rule was first adopted upon a reasonable ground to prevent unnecessary delay, it may, if strictly observed, contradict the maxim, that a court of equity ought not, for form sake, to do a great injustice.<sup>5</sup> However the modern practice is according to the original strictness of the rule;<sup>6</sup> and it may be bet-

<sup>1</sup> See *Hester v. Weston*, 1 Ves. 463; *Jones v. Earl of Strafford*, 3 P. Wms. 79; *Abraham v. Dodgson*, 2 Atk. 157.

<sup>2</sup> *Dormer v. Fortescue*, 2 Atk. 282.

<sup>3</sup> 3 P. Wms. 80.

<sup>4</sup> See *Done v. Peacock*, 3 Atk. 726; see above, p. 272, note 2.

<sup>5</sup> 1 Ves. 247.

<sup>6</sup> *Att. Gen. v. Jenner*, in Chan. 9 Nov. 1738; Sir John Dyneley Goodere against Dean and Chapter of Worces-

ter, where the case requires it, to relax the rule upon special application to the court<sup>1</sup> than to permit it to be evaded.<sup>2</sup> Indeed in some cases an answer to any part of the bill may overrule the demurrer; for, if the ground of demurrer applies to the whole bill, the answering to any part is inconsistent;<sup>3</sup> and therefore when the ground of demurrer was the general impropriety of the bill, and that the defendant ought not, therefore, to be compelled to answer it, his answer to an immaterial part, in compliance with the order for time which he had obtained, overruled his demurrer.<sup>4</sup>

As a demurrer relies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true;<sup>5</sup> \* thus if a demur-

ter, in *Exchequer*, 1777. *Lee* against *Pascoe*, in *Chan. East*. 1780; 1 *Bro. C. C.* 77; 8 *Ves.* 527; 10 *Ves.* 447; see above, p. 303, notes 2, 3 and 4, and p. 304, note 1.

<sup>1</sup> And this, upon a special ground, the court will do. See above, p. 303, note 2.

<sup>2</sup> It seems that very little by way of

answer will satisfy the terms of the order; but that the court considers the practice in this respect to be guarded by the honor of counsel. See *Tomkin v. Lethbridge*, 9 *Ves.* 178; 11 *Ves.* 73.

<sup>3</sup> *Tidd v. Clare*, *Dick.* 712.

<sup>4</sup> *Ruspini v. Vickery*, in *Chan.* 16 Jan. 1793.

<sup>5</sup> 2 *Ves. & Bea.* 95; 1 *Madd.* 565.

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\* A party demurring admits the truth of the allegations in the bill not only as against himself, but also as against another person. So that if a bill alleges that a person has ceased to have interest, a party demurring admits that fact, and cannot object to the suit on account of such person not having been made a party to the record. (*Earle v. Holt*, 9 *Jur.* 773, *V. C. W.* But see *Penfold v. Nunn*, 5 *Sim.* 405.)

Where a bill states the purport of a deed in the possession of the defendant, the court, upon demurrer, must assume such statement to be correct; so that the demurring party is not at liberty to read the deed itself, for the purpose of disproving such statement, even though the bill, for greater certainty, refers to the deed. For, to hold otherwise, would be to give the defendant an advantage depending upon the accident of his having the custody of the deed, and might in effect be to decide the question raised by the demurrer upon matter *dehors* the record. (*Campbell v. Mackay*, 1 *My. & Cr.* 613.)

Where a defendant demurs to a bill for want of equity, he is not to be taken to have confessed the truth of the statements and charges. He only

rer is to the whole bill, the whole<sup>1</sup> is taken for true; if it is to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken to be as stated in the bill; and if the defendant demurs to relief only, the whole case made by the bill to ground the relief prayed is considered as true. A demurrer is therefore always preceded by a protestation against the truth of the matters contained in the bill; a practice borrowed from the common law, and probably intended to avoid conclusion in another suit.

The admission by a demurrer of the truth of the facts stated in the bill has been considered as one reason why a defense founded on length of time, though apparent on the face of the bill, without any circumstance stated to avoid its effect, cannot generally be made by demurrer.<sup>2</sup> \* Upon a demurrer to a bill

<sup>1</sup> That is, everything necessary to support the plaintiff's case which is well charged in the bill. 1 Ves. 426, 427; 1 Ves. jr. 289. Facts on a demurrer are taken to be true; that is, facts which are well and materially alleged. Lord Hardwicke, in *Butler v. Royal Exchange Assurance*, in Chan. 22 Nov. 1749; 1 Ves. jr. 78, 289; 3 Meriv. 503; 1 Madd. 565.

<sup>2</sup> But if the plaintiff's case be so stated in the bill as to show that his claim is barred by lapse of time, and no

ground of exception, as infancy, or the like, be alleged therein, it seems that, contrary to the opinion of Lord Hardwicke, expressed in a case in which the suit was for redemption of a mortgage, after quiet possession by the mortgagee of more than twenty years (see *Aggas v. Pickerell*, 3 Atk. 225; and see 2 Ves. jr. 84), the defendant may demur. *Beckford v. Close*, cited 3 Bro. C. C. 644; 4 Ves. 476; *Ib.* 479; *Foster v. Hodgson*, 19 Ves. 180.

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admits them for the purpose of showing the want of equity even upon the assumption that the statements and charges in the bill are true. All that he says by a demurrer is this: "Even admitting (just for the sake of arguing upon your own grounds, as to the existence of the equity which you assert) that all you say is true, still you have no equity. Without putting myself to the trouble, expense, and delay of disproving your allegations, but taking you on your own grounds, I can show that you have no equity against me." See the Lord Chancellor's remarks in *Thompson v. Barclay*, 9 Law J. [O. S.] 216, 217.

\* A defendant may avail himself of the statute of limitations by demurrer, when the application of the statute to the suit appears on the face of the bill. (*Hoare v. Peck*, 6 Sim. 51.)



brought to impeach transactions which had passed twenty-eight years before the bill was filed, on the ground of fraud, without any sufficient cause shown for not instituting the suit sooner, it was said by the court that the party who demurs admits everything well pleaded, in manner and form as pleaded; and a demurrer ought therefore in a court of law to bring before the court a question of law merely; and in a court of equity, a question of law or equity merely. The demurrer must therefore be taken to admit the whole case of fraud made by the bill;\* and the argument to support it must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law, but that from long acquiescence it should be presumed that the fraud charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction, or had released or submitted upon such consideration as to bar himself from the general equity stated in the bill. This must be an inference of fact, and not an inference of law; and the demurrer must be overruled, because the defendant has no right to avail himself by demurrer of an inference of fact, upon matter on which a jury in a court of law would collect matter of fact to decide their verdict, if submitted to them, or a court would proceed in the same manner in equity. What limitation of time will bar a suit where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of

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\* By demurring to the bill, the defendant does not admit charges of fraud contained in it. (*Nesbitt v. Berridge*, 9 Jur. [N. S.] 1044.)

fact, and not an inference of law,<sup>1</sup> and therefore cannot be made on a demurrer.<sup>2</sup>

A demurrer must express the several causes<sup>3</sup> of demurrer;<sup>4</sup> and in case the demurrer does not go to the whole bill, it must clearly express the particular parts of the bill demurred to.<sup>5</sup> If a demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, it was generally considered that the demurrer being entire must be overruled.<sup>6</sup> But there are instances<sup>7</sup> of allowing a demurrer in part;<sup>8</sup> and a defendant may put in separate demurrers to separate and distinct parts of a bill for separate and distinct causes.<sup>9</sup> For the same ground of demurrer frequently will not apply to different parts of a bill, though the whole may be liable to demurrer; and in this case one demurrer may be overruled upon argument, and another allowed.<sup>10</sup>

<sup>1</sup> See *Cuthbert v. Creasy*, 6 Madd. 189.

<sup>2</sup> *Ld. Deloraine v. Browne*, in Chan. 13 & 14 June, 1792; 3 Bro. C. C. 633. But see p. 298, as to demurrers to bills of review. In *Tobin v. Beckford*, on appeal from Jamaica, 26 July, 1784, a demurrer to a bill to redeem on account of length of time was allowed by the council—present Kenyon, M. R.—after consideration.

<sup>3</sup> See 3 Madd. 8; 1 Jac. R. 467; and see *Harrison v. Hogg*, 2 Ves. jr. 323.

<sup>4</sup> *Peachie v. Twycrosse*, Cary Rep. 113; Ord. in Chan. Ed. Bea. 77, 173.

<sup>5</sup> *Chetwynd v. Lindon*, 2 Ves. 451; *Devonshier v. Newenham*, 2 Sch. & Lefr. 199. And this must be done, not by way of exception, as by demurring to all except certain parts of the bill, but by positive definition of the parts to which he thereby seeks to avoid answering. See *Robinson v. Thompson*, 2 Ves. & Bea. 118; *Weatherhead v. Blackburn*, 2 Ves. & Bea. 121; *sed vide Hicks v. Raincock*, 1 Cox R. 40.

<sup>6</sup> 1 Ves. 248; *Earl of Suffolk v.*

*Green*, 1 Atk. 450; *Todd v. Gee*, 17 Ves. 273; 1 Swanst. 304; 1 Jac. R. 467. But though a demurrer cannot be good in part and bad in part (8 Ves. 403; 11 Ves. 70; 17 Ves. 280), it appears that where such a mode of defense has been resorted to by several defendants jointly, it may be good as to some of them, and bad as to the others. See 8 Ves. 403, 404.

<sup>7</sup> *Rolt v. Lord Somerville*, 2 Eq. Cas. Abr. 759; *Radcliffe v. Fursman*, 2 Bro. P. C. 514, Toml. ed.

<sup>8</sup> Although this is not now the practice, the court will in some instances, on the argument of a demurrer, grant leave, upon overruling it, to the defendant to put in another less extended (*Thorpe v. Macauley*, 5 Madd. 218), and will, even *after* it has been overruled, sometimes be induced to grant a similar indulgence. *Baker v. Mellish*, 11 Ves. 68.

<sup>9</sup> 3 P. Wms. 149; *Roberdeau v. Rous*, 1 Atk. 544.

<sup>10</sup> *North v. Earl and Countess of Strafford*, 3 P. Wms. 148.

If the plaintiff conceives that there is not sufficient cause apparent on the bill to support a demurrer put in to it, or that the demurrer is too extensive, or otherwise improper, he may take the judgment of the court upon it; and if he conceives that by amending his bill he can remove the ground of demurrer, he may do so before the demurrer is argued, on payment of costs, which vary according to the state of the proceedings.<sup>1</sup> But after a demurrer to the whole of a bill has been argued and allowed, the bill is out of court, and therefore cannot be regularly amended.<sup>2</sup> To avoid this consequence the court has sometimes, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill, paying the costs incurred by the defendant; and this has been frequently done in the case of a demurrer for want of parties.<sup>3</sup> Where a demurrer leaves any part of a bill untouched, the whole may be amended notwithstanding the allowance of the demurrer; for the suit in that case continues in court, the want of which circumstance seems to be the reason of the contrary practice where a demurrer to the whole of a bill has been allowed. A demurrer being frequently on matter of form is not in general a bar to a new bill; but if the court upon a demurrer has clearly decided upon the merits of the question between the parties, the decision may be pleaded in bar of another suit.<sup>4</sup>

<sup>1</sup> Anon. Mosely, 301; 1 Ves. jr. 448; Anon. 9 Ves. 221; 1 Alm. Cur. Canc. 565; 1 Harrison, Chan. Pract. 39.

<sup>2</sup> See above, p. III, note 1; Lord Coningsby v. Sir Jos. Jekyll, 2 P. Wms. 300, and note; and Watkins v. Bush, Dick. 701.

<sup>3</sup> And the court upon allowing a demurrer, will sometimes give the plaintiff leave to amend (see Mayor, &c. of

London v. Levy, 8 Ves. 398; Edwards v. Edwards, 6 Madd. 255); and it seems probable that, even *after* allowance, the court might be induced, under some circumstances, to set the cause on foot again, and to authorize an amendment of the bill. See 11 Ves. 72.

<sup>4</sup> See the cases upon demurrers to bills of review cited above, p. 298, note 3.

A demurrer being always upon matter apparent upon the face of the bill, and not upon any matter alleged by the defendant, it sometimes happens that a bill, which, if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid showing upon the face of it any cause of demurrer. In this case the defendant is compelled to resort to a plea, by which he may allege matter which if it appeared on the face of the bill would be good cause of demurrer. For in many cases what is a good defense by way of plea is also good as a demurrer, if the facts appear sufficiently by the bill.<sup>1</sup> And if a demurrer should be overruled on argument because the facts do not sufficiently appear on the face of the bill, defense may be made by plea, stating the facts necessary to bring the case truly before the court, though it has been said that the court would not permit two dilatories.<sup>2</sup> And after a plea overruled, it is said that a demurrer was allowed, bringing before the court the same question in substance as was agitated in arguing the plea.<sup>3</sup> But after a demurrer has been overruled, a second demurrer will not be allowed;<sup>4</sup> for it would be in effect to rehear the case on the first demurrer; as on argument of a demurrer any cause of demurrer, though

<sup>1</sup> See Hetley, 139. But see 3 Atk. 226.

<sup>2</sup> *Hudson v. Hudson*, in Chan. 23 April, 1734, reported 1 Sim. & Stu. 512, note; *Rowley v. Eccles*, 1 Sim. & Stu. 511.

<sup>3</sup> *East India Company v. Campbell*, 1 Ves. 246. But it may be doubted whether this case has not been mistaken by the reporter, and whether the question was not on exceptions to an answer. See 2 Ves. 491, 492.

<sup>4</sup> See 2 Bro. C. C. 66; and see above, p. 308, note 8. Where, however, a demurrer was informal in its frame, but

good in substance, it was overruled, with liberty to the defendant to file another. See *Devonsher v. Newenham*, 2 Sch. & Lefr. 199. And, in consequence of the modern doctrine, that a defendant who submits to answer must in general answer fully (see below, Ch. 2, sect. 2, part 3), this court, in some instances, on overruling a demurrer to discovery, instead of giving the defendant liberty to insist by answer that he is not bound to make the disclosure required, will give him liberty to file another less extensive. See *Thorpe v. Macauley*, 5 Madd. 218.

not shown in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer.<sup>1</sup>

## SECTION II.—PART II.

### *Of Pleas.*

In treating of pleas the same order may be conveniently pursued as has been already used in treating of demurrers. Pleas to original bills will therefore be first considered, and under that head the nature of pleas in general, and the principal grounds of plea to every kind of bill will necessarily be noticed; the distinct pleas applicable peculiarly to the several other kinds of bill will be next mentioned; and in the third place the frame of pleas in general, and the manner in which their validity may be determined, will be considered. Pleas to original bills will also be considered under the two heads of pleas to relief, and pleas to discovery only, and these will necessarily involve the consideration of pleas to bills of discovery merely.

A demurrer has been mentioned to be the proper mode of defense to a bill when any objection to it is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it. When an objection to a bill is not apparent on the bill itself,<sup>2</sup> if the defendant means to take advantage of it, he ought to show to the court the matter which creates the objection, either by answer or by

<sup>1</sup> As to demurrers *ore tenus*, see *Pyle v. Price*, 6 Ves. 779; 8 Ves. 408; *Dummer v. Corporation of Chippenham*, 14 Ves. 245; 17 Ves. 216; *Att. Gen. v. Moses*, 2 Madd. 294; 1 Swanst. 288; *Knye v. Moore*, 1 Sim. & Stu. 61; *Hook v. Dorman*, 1 Sim. & Stu. 227.

<sup>2</sup> See *Billing v. Flight*, 1 Madd. 230.

plea, which has been described as a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred.<sup>1</sup> The defense proper for a plea is such as reduces the cause, or some part of it, to a single point,<sup>2</sup> and from thence creates a bar to the suit, or to the part to which the plea applies.<sup>3</sup> It has been observed that the end of a plea is to save to the parties the expense of an examination of witnesses at large; and that therefore it is not every good defense in equity that is good as a plea; for that where the defense consists of a variety of circumstances, there is no use of a plea, as the examination must still be at large; and the effect of allowing a plea would be that the court would give judgment on the circumstances of the case before they were made out by proof.<sup>4</sup>

Pleas have been generally considered as of three sorts: to the jurisdiction of the court; to the person of the plaintiff or defendant; and in bar of the suit. As they have been usually arranged under these heads, it may be convenient to consider them in some degree with reference to that arrangement; but the order before observed in treating of demurrers may be at the same time pursued; and pleas may be considered with reference to the several grounds already mentioned on which defense may be made to a bill.

The objections to the relief sought by an original bill which can be taken advantage of by way of plea, are nearly the same as those which may be the subject of demurrer; but they are rather more numerous, be-

<sup>1</sup> Prac. Reg. 324, Wy. ed.; 2 Sch. & Lefr. 725; 1 Madd. 194.

<sup>2</sup> 1 Atk. 54; 15 Ves. 82, 377.

<sup>3</sup> 2 Bligh P. C. 614.

<sup>4</sup> Chapman v. Turner, 1 Atk. 54; S. C. 1 Har. Chan. Prac. 356; 2 Bligh P. C. 614.

cause a demurrer can extend to such only as may appear on the bill itself, whereas a plea proceeds on other matter. The principal are : I. That the subject of the suit is not within the jurisdiction of a court of equity ; II. That some other court of equity has the proper jurisdiction ; III. That the plaintiff is not entitled to sue by reason of some personal disability ; IV. That the plaintiff is not the person he pretends to be, or does not sustain the character he assumes ; V. That the plaintiff has no interest in the subject, or no right to institute a suit concerning it ; VI. That he has no right to call on the defendant concerning it ; VII. That the defendant is not the person he is alleged to be, or does not sustain the character he is alleged to bear ; VIII. That the defendant has not that interest in the subject which can make him liable to the demands of the plaintiff ; IX. That, for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays ; [X. That the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right].\* Of these, the second is the plea generally termed a plea to the jurisdiction of the court ; and the third, the fourth, and the seventh, are treated as pleas to the person of the plaintiff and defendant ; the others are considered as pleas in bar of the suit. XI. The deficiency of a bill to answer the purposes of complete justice may also be shown by plea, which may be considered as in bar of the suit, though perhaps a temporary bar only ;

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\* The passage within the brackets is inserted, and the following numerals are altered from X. and XI. to XI. and XII., in order to make this part agree with what occurs at pages 361 and 366.

XII. The impropriety of unnecessarily multiplying suits may be the subject of plea, which is also in bar of the suit; but the inconvenience which may arise from confounding distinct matters in the same bill, as it must be apparent on the bill itself, unless very artfully framed, can in general only be alleged by demurrer.

Those pleas which are commonly termed pleas to the jurisdiction of the court do not dispute the rights of the plaintiff in the subject of the suit, or that they are fit objects of the cognizance of a court of equity, but simply assert that the Court of Chancery is not the proper court to take cognizance of those rights. Pleas to the person of the plaintiff also do not dispute the validity of the rights which are made the subject of the suit, but object to the plaintiff that he is by law disabled to sue in a court of justice or cannot institute a suit alone; or that he is not the person he pretends to be, or does not sustain the character he assumes. Pleas in bar are commonly described as allegations of foreign matter, whereby, supposing the bill so far as it is not contradicted by the plea<sup>1</sup> to be true, yet the suit, or the part of it to which the plea extends, is barred.<sup>2</sup> But this description perhaps does not comprise every kind of plea, or does not mark the distinctions between the different kinds with sufficient accuracy.

I. The general objects of the jurisdiction of a court of equity, and the manner in which a want of jurisdiction may be alleged by demurrer, when a bill does not propose to attain any of those objects, or it is apparent on the face of it that none can be attained by it, have

<sup>1</sup> 2 Atk. 51.

<sup>2</sup> Prac. Reg. 327, Wy. ed.; 1 Madd.  
194.



been already mentioned. A case which is not really such as will give a court of equity jurisdiction cannot easily be so disguised in a bill as to avoid a demurrer; but there may be instances to the contrary; and in such cases it should seem a plea of the matter necessary to show that the court has not jurisdiction on the subject, though perhaps unavoidably in some degree a negative plea, would hold.<sup>1</sup> Thus, if the jurisdiction was attempted to be founded on the loss of an instrument, where, if the defect arising from the supposed accident had not happened, the courts of ordinary jurisdiction could completely decide upon the subject, perhaps a plea showing the existence of the instrument, and that it was in the power of the plaintiff to obtain a production of it, ought to be allowed, though instances of this sort of plea may not occur in practice. For it seems highly unreasonable that a plaintiff by alleging a falsehood in his bill should be permitted to involve a defendant in the expense of a suit in equity, though the bill may finally be dismissed at the hearing of the cause, if the defendant answers the case made by it, and enters into his defense at large. No authority, however, occurs to support such a plea;<sup>2</sup> and as there is little disposition in the courts of equity to countenance those defenses which tend to prevent the progress of a suit to a hearing in the ordinary way, whatever the expense of the proceeding may be, it would hardly be prudent to endeavor thus to put a stop to an attempt to transfer the jurisdiction of a suit from the ordinary courts to a court of equity; and indeed the guard put upon cases of this kind, by requiring the affidavit of the plaintiff of the truth of the matter

<sup>1</sup> See *Armitage v. Wadsworth*, 1 Madd. 189.

<sup>2</sup> See 1 Madd. 195.

which he alleges by his bill to support the jurisdiction of the court, is likely to prevent any abuse upon this head.

II. Though the subject of a suit may be within the jurisdiction of a court of equity, yet if the Court of Chancery is not the proper jurisdiction, the defendant may plead the matter which deprives the court of jurisdiction, and show to what court the jurisdiction belongs,<sup>1</sup> and upon this ground may demand the judgment of the court whether he shall be compelled to answer the bill.<sup>2</sup> Pleas of this nature arise principally where the suit is for land within a county palatine,<sup>3\*</sup> or where the defendant claims the privileges of a university,<sup>4</sup> or other particular jurisdiction.<sup>5</sup>

The Court of Chancery, being a superior court of general jurisdiction, nothing shall be intended to be out of its jurisdiction which is not shown to be so.<sup>6</sup> It is requisite, therefore, in a plea to the jurisdiction of the court, to allege that the court has not jurisdiction of the subject, and to show by what means it is deprived of jurisdiction.<sup>7</sup> It is likewise necessary to show what court has jurisdiction.<sup>8</sup> If the plea does not properly set forth these particulars<sup>9</sup> it is bad in

<sup>1</sup> *Earl of Derby v. Duke of Athol*, 1 Ves. 202; *Nabob of the Carnatic v. E. I. Comp.* 1 Ves. jr. 371; s. c. 3 Bro. C. C. 292.

<sup>2</sup> *Chan. Prac.* 417, 420; 3 *Atk.* 264.

<sup>3</sup> *Com. Dig. Chan. Plea I*; 1 *Chan. Prac.* 420; *Edgworth v. Davies*, 1 *Cas. in Chan.* 40. Reported, upon view of precedents, that the jurisdiction of the counties palatine was allowed, between parties dwelling within the same, and for lands there, and matters local. *Nels.* 37, 66. See also *Willoughby v. Brearton*, Cary, 60; *Gerrard v. Stanley*, 1 *Chan. Rep.* 278.

<sup>4</sup> *Temple v. Foster*, Cary, 65; *Cotton v. Manering*, Cary, 73; *Draper v. Crowther*, 2 *Vent.* 362; *Stephens v. Berry*, 1 *Vern.* 212.

<sup>5</sup> See *Cunningham v. Wegg*, 2 *Bro. C. C.* 241.

<sup>6</sup> 1 *Ves.* 204; 2 *Ves.* 357.

<sup>7</sup> See 3 *Bro. C. C.* 301; 1 *Ves. jr.* 388.

<sup>8</sup> *Strode v. Little*, 1 *Vern.* 59; *Earl of Derby v. Duke of Athol*, 1 *Ves.* 202; s. c. *Dick.* 129.

<sup>9</sup> See *Moor v. Somerset*, *Nels.* 51; and see 9 *Mod. Rep.* 95.

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\* See note † to p. 103.

point of form.<sup>1</sup> In point of substance it is necessary, to entitle the particular jurisdiction to exclusive cognizance of the suit, that it should be able to give complete remedy.<sup>2</sup> A plea, therefore, of privilege of the university of Oxford, to a bill for a specific performance of an agreement touching lands in Middlesex, was overruled; for the university court could not give complete relief.<sup>3</sup> And if a suit is instituted against different persons, some of whom have privilege, and some not;<sup>4</sup> or if one defendant is not amenable to the particular jurisdiction,<sup>5</sup> a plea will not hold. If, likewise, there is a particular jurisdiction, and yet the parties to litigate any question are both resident within the jurisdiction of the Court of Chancery; as upon a bill concerning a mortgage of the island of Sarke, both mortgagor and mortgagee residing in England, the Court of Chancery will hold jurisdiction of the cause: for a court of equity *agit in personam*.<sup>6</sup> So where the court may not have jurisdiction to give relief, it may yet entertain a bill for a discovery in aid of the court which can give relief, if the same discovery cannot be there obtained; as if the jurisdiction be in the king in council, where the defendant cannot be compelled to answer upon oath.<sup>7</sup>

Similar to a plea to the jurisdiction is the case of a plea to an information charging an undue election of a fellow of a college in one of the universities, "that by the statutes the visitor of the college ought to deter-

<sup>1</sup> *Foster v. Vassal*, 3 Atk. 587. And see *Nabob of Arcot v. East Ind. Comp.* 3 Bro. C. C. 292; s. c. 1 Ves. jr. 371.

<sup>2</sup> *Newdigate v. Johnson*, 2 Cas. in Chan. 170; *Wilkins v. Chalcroft*, 22 Vin. Abr. 10; *Green v. Rutherford*, 1 Ves. 463.

<sup>3</sup> *Draper v. Crowther*, 2 Ventr. 362; *Stephens v. Berry*, 1 Vern. 212.

<sup>4</sup> *Lowgher v. Lowgher*, Cary, 55; s. c. 22 Vin. Abr. 9; *Fanshaw v. Fanshaw*, 1 Vern. 246.

<sup>5</sup> *Grigg's Case*, Hutton, 59; and see 4 Inst. 213; *Hilton v. Lawson*, Cary, 48.

<sup>6</sup> *Toller v. Carteret*, 2 Vern. 494; 1 Ves. 204; 3 Ves. 182; 5 Madd. 307.

<sup>7</sup> 1 Ves. 205.

mine all controversies concerning elections of fellows, and that such controversies ought not to be determined elsewhere.”<sup>1</sup> But the extent of the visitor’s authority must be averred, and it must also be averred that he is able to do complete justice.<sup>2</sup> And where there is a trust created, the visitor having no power to compel performance of the trust, relief must be had in the king’s courts of general jurisdiction.<sup>3</sup>

III. In respect to the person of the plaintiff, it may be shown that he is disabled to sue, as being: 1, outlawed; or 2, excommunicated; or 3, a Popish recusant convict; or 4, attainted in a premunire, or of treason or felony; or 5, an alien; or it may be shown, 6, that the plaintiff is incapable of instituting a suit alone. A plea of this kind is in the nature of a plea in abatement of the suit.

1. A person outlawed is disabled from suing in a court of justice, and if a bill is filed in his name, the defendant may plead the outlawry, which, whilst it remains in force, will delay the proceeding.<sup>4</sup> The record of the outlawry, or the *capias* thereupon, must be pleaded *sub pede sigilli*, and is usually annexed to the plea.<sup>5</sup> A plea of outlawry, in a suit for the same duty or thing for which relief is sought by the bill, is insufficient according to the rule of law, and shall be

<sup>1</sup> Att. Gen. *v.* Talbot, 3 Atk. 662; s. c. 1 Ves. 78. And see 1 Ves. 472, 474, 475; 2 Ves. 328.

<sup>2</sup> 1 Ves. 474.

<sup>3</sup> Green *v.* Rutherford, 1 Ves. 462. and see 4 Bro. C. C. 167; 2 Ves. jr. 47; 13 Ves. 533; *Ex parte* Berkhamstead School, 2 Ves. & Bea. 134.

<sup>4</sup> A plea of outlawry may be filed without oath (1 Cas. in Chan. 258; Took *v.* Took, 2 Vern. 198; Anon. 2 Freem. 143, Hovend. ed.; but see Farrot *v.* Bowden, Ib. 37), the main fact appearing upon record (Ord. in Chan. Ed. Bea. 23; 2 Ves. & Bea. 357); and a mere

avermment of identity being considered sufficient (2 Vern. 199; and see 19 Ves. 83). And such a plea may be filed by a defendant who is in contempt. Waters *v.* Chambers, 1 Sim. & Stu. 225.

<sup>5</sup> Tothill, 54; Prac. Reg. 327, Wy. ed.; Ord. in Chan. Ed. Bea. 27. And in a case in which the formality alluded to had been omitted, by mistake of the clerk of the outlawries, the plea was allowed to be amended, by annexing to it an office copy of the exigent or record of the outlawry. Waters *v.* Mayhew, 1 Sim. & Stu. 220.

disallowed of course, as put in for delay;<sup>1</sup> Otherwise a plea of outlawry is always a good plea so long as the outlawry remains in force;<sup>2</sup> but if that shall be reversed, the plaintiff, upon payment of costs, may sue out fresh process against the defendant, and compel him to answer the bill.<sup>3</sup> Outlawry in a plaintiff executor or administrator cannot be pleaded; for he sues *en autre droit*.<sup>4</sup> It is equally insufficient if alleged in disability of a person named in a bill as the next friend of an infant plaintiff,<sup>5</sup> or in an information as a relator.<sup>6</sup>

2. The defendant may plead that the plaintiff is excommunicated,<sup>7</sup> \* which must be certified by the ordinary, either by letters patent containing a positive affirmation that the plaintiff stands excommunicated, and for what; or by letters testimonial reciting "*quod scrutatis registeriis invenitur*," &c. Either of these certificates must be *sub sigillo*, and so pleaded.<sup>8</sup> Excommunication is a good plea to an executor or administrator, though they sue *en autre droit*,<sup>9</sup> but not to the next friend of an infant.<sup>10</sup> This, like the plea of outlawry, ceases to be a bar when the disability is removed; and therefore the plaintiff, purchasing letters

<sup>1</sup> See *Philips v. Gibbons*, 1 Ves. & Bea. 184; Ord. in Chan. Ed. Bea. 175.

<sup>2</sup> Ord. in Chan. Ed. Bea. 175; 3 Bac. Abr. 761, Outlawry (3).

<sup>3</sup> Ord. in Chan. Ed. Bea. 175; and see *Peyton v. Ayliffe*, 2 Vern. 312.

<sup>4</sup> *Killigrew v. Killigrew*, 1 Vern. 184; Prac. Reg. 326, Wy. ed.

<sup>5</sup> Prac. Reg. 327, Wy. ed.

<sup>6</sup> There is a case (*Att. Gen. v. Heath*, Prec. in Chan. 13) where a plea of outlawry, in disability of the person of a relator, is said to have been allowed in the duchy court of Lancaster. But the

relator seems to have sustained the character of plaintiff as well as of relator. See 3 Bac. Abr. 762, Outlawry (3); and see also *Waller v. Hanger*, 2 Bulstr. 134; *Palmer's Case*, And. 30.

<sup>7</sup> And this plea may be put in without oath, if the excommunication appear upon record. Ord. in Chan. Ed. Bea. 26, and 2 Ves. & Bea. 327.

<sup>8</sup> Ord. in Chan. Ed. Bea. 27; Prac. Reg. 327, Wy. ed.; *Tothill*, 54.

<sup>9</sup> Co. Litt. 134, a; 2 Bac. Abr. 319; Excom. (D).

<sup>10</sup> Prac. Reg. 278.

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\* This disability has been removed by the stat. 53 Geo. III, c. 127, s. 3.

of absolution, may, as at law, sue out fresh process, and compel the defendant to answer.<sup>1</sup>

3. By statute 3 Jac. I, c. 5, s. 11, every Popish recusant convict is in many cases disabled to sue,\* in the same manner as a person excommunicated. The instances of a plea of conviction of recusancy have probably been rare, as no traces of any occur in the books of reports, nor does the form of the plea appear in the books of practice. If advantage should be attempted to be taken of this statute, the court would probably require the same averments to support the plea as are necessary to a plea of the same nature at law.<sup>2</sup> This plea also ceases to be a bar if the plaintiff by conforming removes the disability.<sup>3</sup>

4. A plea that the plaintiff is disabled from suing, being attainted, is equally rare.<sup>4</sup> It would probably be likewise judged with the same strictness as if it was a plea at law.<sup>5</sup>

5. There is little more to be found in the books upon the subject of a plea that the plaintiff is an alien.<sup>6</sup> An alien, who is not an alien enemy, is under no disability of suing for any personal demand;<sup>7</sup> and an

<sup>1</sup> *Amers v. Legg*, Choice Cas. in Chan. 164; Prac. Reg. 327, Wy. ed. It should here be mentioned that, by stat. 53 Geo. III, c. 127, excommunication is discontinued, except in certain cases therein specified.

<sup>2</sup> 3 Bac. Abr. 780, Papists (1). See Lord Petre v. Univ. of Cambridge, Lutwyche, 1100.

<sup>3</sup> See stat. 31 Geo. III, c. 32, s. 3, and valuable note to Co. Litt. p. 391, a, note 2, Hargr. & Butl. ed.

<sup>4</sup> See — v. Davies, 19 Ves. 81; and see *Ex parte* Bullock, 14 Ves. 452. And case on Irish statutes, Kennedy v. Daly, 1 Sch. & Lefr. 355.

<sup>5</sup> 2 Atk. 399. This kind of plea is

not to be supported by oath, but can be proved by the record alone. — v. Davies, 19 Ves. 81; 2 Ves. & Bea. 327.

<sup>6</sup> *Burk v. Brown*, 2 Atk. 397; 2 Vin. Abr. 274, Alien (1); 1 Bac. Abr. 83, Alien (D); Prac. Reg. 327, Wy. ed.; Rast. Entr. 252; Bolt v. Att. Gen. 1 Bro. P. C. 421, Toml. ed.; *Albrect v. Sussman*, 2 Ves. & Bea. 323; and see *Ex parte* Lee, 13 Ves. 64; and *Ex parte* Boussmaker, 13 Ves. 71.

<sup>7</sup> *Ramkissenseat v. Barker*, 1 Atk. 51. As to the incapacities of aliens to take and to hold certain property, see Co. Litt. 2, b, and notes in Hargr. & Butl. ed. In such cases, it is presumed that a plea of mere alienage, if properly

\* This disability has been removed by the stat. 31 Geo. III, c. 32.

alien enemy may sue under some circumstances.<sup>1</sup> A plea has been put in to a bill filed by an alien infidel not of the Christian faith, and was attempted to be supported upon the ground that the plaintiff was upon a cross-bill incapable of being examined upon oath. The plea was overruled without argument.<sup>2</sup>

6. If a bill is filed in the name of any person incapable *alone* of instituting a suit, as an infant, a married woman, or an idiot or lunatic, so found by inquisition, the defendant may plead the infancy, the coverture,<sup>3</sup> or the inquisition of idiotcy or lunacy,<sup>4</sup> in abatement of the suit.

IV. A plea that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, and therefore is not entitled to sue as such,<sup>5</sup> though a negative plea, is good in abatement of the suit; as where a plaintiff entitled himself as administrator, and the defendant pleaded that he was not administrator.<sup>6</sup> And where a plaintiff entitled himself as administrator of an intestate, and the defendant pleaded that the supposed intestate was living,<sup>7</sup> the plea was allowed. It has been made a question how far a negative plea can be good.<sup>8</sup> To a bill by a person claiming as heir to a person dead, the defendant pleaded that another person was heir, and that the plaintiff was not heir to the deceased, and the plea was

framed, would be a sufficient defense. See *Co. Litt.* 129, b; and *Burk v. Brown*, 2 Atk. 397.

<sup>1</sup> 3 Burr. 1741; 1 Bac. Abr. 84, Alien (D); Doug. 619; Cornu and Blackburne, and the case of *Anthon v. Fisher*, in Doug. note 1, p. 626. But the latter case was afterwards reversed in the Exchequer Chamber, 16th Nov. 1784. And see *Evans v. Richardson*, 3 Meriv. 469.

<sup>2</sup> *Ramkissenseat v. Barker*, 1 Atk. 51.

<sup>3</sup> *Prac. Reg.* 326, Wy. ed.

<sup>4</sup> See case of the plaintiff being in a

state of mere mental incapacity, *Wartnaby v. Wartnaby*, 1 Jac. 377.

<sup>5</sup> *Prac. Reg.* 326, Wy. ed.

<sup>6</sup> *Winn v. Fletcher*, 1 Vern. 473; but see *Fell v. Lutwidge*, 2 Atk. 120; 3 Barnard, 320.

<sup>7</sup> Ord against Huddleston, Dick. 510; s. c. cited Cox, 198.

<sup>8</sup> But that question has been set at rest. 11 Ves. 302, 305. See instances of negative pleas referred to in the next page.

overruled,<sup>1</sup> but this decision was afterwards doubted by the learned judge himself,<sup>2</sup> when pressed by the necessary consequence, that any person falsely alleging a title in himself might compel any other person to make any discovery which that title, if true, would enable him to require, however injurious to the person thus improperly brought into court; so that any person might, by alleging a title, however false, sustain a bill in equity against any person for anything so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house, and even the private transactions of every family, might be exposed; and this might be done in the name of a pauper, at the instigation of others, and for the worst purposes.<sup>3</sup> \* To avoid this inconvenience, a defendant

<sup>1</sup> Newman v. Wallis, 2 Bro. C. C. 142; and see Gunn v. Prior, Dick. 657; s. c. 1 Cox, 197; Forrest, Ex. 88, n.; Kinnersley v. Simpson, Forrest, 85. See also Earl of Strathmore v. Countess of Strathmore, 2 Jac. & W. 541.

<sup>2</sup> 3 Bro. C. C. 489; 1 Madd. 194. And it seems to have been established, that in such a case a plea that the plaintiff is not heir, without showing

who is heir, would be good, for that the defendant might not be able to prove. 16 Ves. 264, 265.

<sup>3</sup> As further examples of negative pleas, see Drew v. Drew, 2 Ves. & Bea. 159; Sanders v. King, 6 Madd. 61; and Yorke v. Fry, Ib. 65, that plaintiff is not a partner; and Thring v. Edgar, 2 Sim. & Stu. 274, and particularly at p. 280, that he is not a creditor.

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\* Such a negative as above mentioned is a good plea. And where a plea is in substance a negative plea, though in form it is an affirmative plea, it must be accompanied by an answer as to allegations which, if true, would disprove the plea. Thus where the plaintiff claims as heir *ex parte materna*, and the defendant pleads that another person is heir *ex parte paterna*, in such case the plea is in substance a plea of no title as heir, and must be accompanied by the answer as to admissions of the plaintiff's title alleged to have been made by the defendant. (Harland v. Emerson, 8 Bligh [N. S.] 62.)

A plea which negatives the plaintiff's title, does not protect the defendant from answer and discovery as to such matters as are specially charged "as evidence," of the plaintiff's title. (Sanders v. King, 2 Sim. & Stu. 277.) But it does protect him from answer and discovery generally as to the subject of the suit; and indeed as to all matters which the plaintiff does not distinctly inform the defendant are the circumstances by which the



has in some cases been permitted to negative the plaintiff's title by answer, and thus to protect himself against the required discovery ; but in other cases this has not been allowed, and the subject seems still to require further consideration.<sup>1</sup>

V. Interest in the subject of the suit, or a right to the thing demanded, and proper title to institute a suit concerning it, have been mentioned as essentially necessary to sustain a bill ; and it has been observed that if they are not fully shown by the bill itself, the defendant may demur. But a title apparently good may be

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<sup>1</sup> See 11 Ves. 283, 296, and 303, and the several cases there cited, with the discordant opinions of several judges. In the case of *Gethin v. Gale*, cited in Ambl. 354, the master of the rolls sitting for the chancellor, 29 Oct. 1739, said it was one thing to deny a title in the plaintiff, and another to show a title in one's self; and that the former had never been allowed as a good plea. Mr. Capper's note. See the authorities cited in the last note, and in the notes to the next page and below, chap. II, sect. 2, part 3.

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plaintiff's title is to be established. (*Sanders v. King*, 2 Sim. & Stu. 277 ; *Thring v. Edgar*, 2 Sim. & Stu. 274.)

Admissions of title, however, form an exception to this. For, in order to obtain an answer as to admissions of title, when in effect a plea of no title is put in, it is not necessary that the plaintiff should allege such admissions "as evidence" of his right or title, or should by any other terms point out that he requires a discovery of them as evidence of his title ; because their very nature renders this superfluous. (*Harland v. Emerson*, 8 Bligh [N. S.] 62.)

Where a plaintiff claims estates, either as heir to the person last seized, or as a remainder-man under the limitations of a settlement in the possession of the defendant, under which, as he charges, the person last seized took only a life estate, or under the limitations of some prior settlement in the possession of the defendant, which, as he charges, the person last seized had no power to defeat ; and the defendant pleads that the person last seized had an estate tail, and suffered a recovery to the use of himself in fee, and then devised the estates to the defendant, but takes no notice of the settlement particularly mentioned in the bill, or of any other settlement, the plea will be overruled ; because the defendant ought in such case to traverse the grounds of the plaintiff's title, or some substantial part of it—to deny the existence of such settlement, or at least to deny the fact of his possession or knowledge of the contents thereof. (*Hungate v. Gascoigne*, 1 Russ. & M. 698.)

stated in a bill, and yet the plaintiff may not really have the title he states,\* either because he misrepresents himself, which has been considered under the last head, or because he suppresses some circumstances respecting his title which, if disclosed, would show either that nothing was ever vested in him, or that the title which he had has been transferred to another; and this the defendant may show by plea in bar of the suit. As if a plaintiff claims as a purchaser of a real estate, and the defendant pleads that he was a Papist, and inca-

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\* If a party having no interest be joined as coplaintiff with a person having an interest, and that fact does not appear on the face of the bill, but is brought forward by a plea, such a plea is a good defense to the suit. An instance of this kind occurs where an uncertificated bankrupt is made a coplaintiff. (*Makepeace v. Haythorne*, 4 Russ. 244.)

If to a bill filed by the assignee of an insolvent debtor, the defendant pleads that the consent of the creditors and of the Insolvent Debtors' Court to the institution of the suit had not been obtained, the plea will be overruled; because the provision made in the statute as to such consent is made for the benefit of the creditors alone. (*Casborne v. Barsham*, 6 Sim. 317. See also note \*, p. 248, *supra*.)

According to the case of *Ocklestone v. Benson*, to a bill by the assignees of a bankrupt against a debtor, the latter may plead that the suit was not instituted with the consent of the major part in value of the creditors, at a meeting pursuant to the act of parliament. (2 Sim. & Stu. 265. But see preceding paragraph, and note \*, p. 248, *supra*.)

A plea of no interest will be allowed where a suit is instituted by two persons on behalf of themselves and all other shareholders in a company, but one of the two has sold and assigned his shares before the institution of the suit. (*Doyle v. Muntz*, 10 Jur. 914, V. C. W.)

To a bill for dower, a plea of *ne unques accouple*, that is, a plea that the plaintiff and the person whose widow she claims to be were never lawfully married, is a good plea. (*Poole v. Poole*, 1 Coll. Eq. Ex. 331.)

Where administration is granted under the impression that the deceased died intestate, and then the executor files a bill to recover part of the assets, alleging that he has proved the will, a plea of no probate having been granted, will be allowed. For until probate is obtained, it is not certain but that the administration is valid. (*Simon v. Milman*, 2 Sim. 241.)

pable of taking by purchase ;<sup>1</sup> \* or a plaintiff claims property under a title accrued previous to conviction of himself, or of a person under whom he claims, of some offense which occasioned a forfeiture,<sup>2</sup> or previous to a bankruptcy,<sup>3</sup> or any other defect in the title<sup>4</sup> of the plaintiff to the matter claimed by the bill. A plea of conviction of any offense which occasions forfeiture, as manslaughter, must be pleaded with equal strictness as a plea of the same nature at common law.<sup>5</sup> But if a plea goes to show that no title was ever vested in the plaintiff, though for that purpose it states an offense committed, conviction of the offense is not essential to the plea, and the same strictness is not required as in a case of forfeiture. Thus, in the Exchequer, to a bill seeking a discovery of the owners of a ship captured, and payment of ransom, the defendants pleaded that the captor was a natural born subject, and the capture an act of piracy. Though the barons at first thought that the plea could not be supported unless the plaintiff had been convicted of piracy, and the record of the conviction had been annexed to the plea, they were finally of opinion that as the plea showed that the capture was not legal, and that therefore no title had ever been in the plaintiff, the plea was good, and they allowed

<sup>1</sup> See, however, 18 Geo. III, c. 60, s. 2; and the 43 Geo. III, c. 30, by which this incapacity is conditionally removed.

<sup>2</sup> 2 Atk. 399; ——— *v. Davis*, 19 Ves. 81.

<sup>3</sup> *Carleton v. Leighton*, 3 Meriv. 667. See *Lowndes v. Taylor*, 1 Madd. 423; s. c. 2 Rose, 365, 432. It seems a plea of the plaintiff's bankruptcy must be upon oath. *Joseph v. Tuckey*, 2 Cox R. 44. See instance of a plea

that the plaintiff had taken the benefit of an act for the relief of insolvent debtors. *De Minckwitz v. Udney*, 16 Ves. 466.

<sup>4</sup> *Quilter v. Mussendine*, Gilb. Cas. in Eq. 228; *Hitchins v. Lander*, Coop. R. 34; *Gait v. Osbaldeston*, 1 Russ. 158, in which the decision in s. c. reported 5 Madd. 428, was overruled; and see *Ocklestone v. Benson*, 2 Sim. & Stu. 265.

<sup>5</sup> 2 Atk. 399.

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\* This incapacity has been abolished by the stat. 10 Geo. IV, c. 7, s. 23.

it accordingly.<sup>1</sup> Pleas of want of title generally extend to discovery as well as to relief.<sup>2</sup>

It cannot often be necessary to make defense on this ground by way of plea; for if facts are not stated in the bill from which the court will infer a title in the plaintiff, though the bill does contain an assertion that the plaintiff has a title, the defendant may demur; the averment of title in the bill being not of a fact, but of the consequence of facts. Thus, where a plaintiff stated an incumbrance on a real estate, of which he was devisee, and averred that it was the debt of the testator, and prayed that it might be paid out of the testator's personal estate in case of the real estate devised, the defendant having pleaded that the testator had done no act by which he made it his own debt, the plea was overruled, because, whether it was his debt or not was matter of inference from the facts stated in the bill, and therefore the proper defense was by demurrer.<sup>3</sup> Accordingly the defendant afterwards demurred, and the demurrer was allowed.<sup>4</sup>

VI. In treating of demurrers notice has been taken that, though a plaintiff has an interest in the subject of a suit, and a right to institute a suit concerning it, yet he may have no right to call upon the defendant to answer his demands; and it has been observed that this happens where there is a want of privity of title between the plaintiff and the defendant.<sup>5</sup> It would probably be difficult to frame a bill which was really liable to objection on this head so artfully as to avoid a demurrer. But if such a bill could be framed, it should seem that defense might be made by plea.

<sup>1</sup> Fall against —, 1st May, 1782.

<sup>2</sup> Gilb. 229.

<sup>3</sup> Tweddell v. Tweddell, 25th May, 1784, in Chancery.

<sup>4</sup> Same cause, 18th July, 1786.

<sup>5</sup> See above, p. 251.

VII. A plea that the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear, is mentioned as a plea which may be supported.<sup>1</sup> It seems to have been considered as more convenient for a defendant under these circumstances to put in an answer alleging the mistake in the bill, and praying the judgment of the court whether he should be compelled further to answer the bill;<sup>2</sup> but this in fact amounts to a plea, though it may not bear the title; and a plea has been considered as the proper defense.<sup>3</sup> \*

VIII. If a defendant has not that interest in the subject of a suit which can make him liable to the demands of the plaintiff,† and the bill alleging that he has or claims an interest avoids a demurrer, he may plead the matter necessary to show that he has no interest,<sup>4</sup> if the case is not such that by a general disclaimer he can satisfy the suit.<sup>5</sup> Thus, where a witness to a will was made a defendant to a bill brought by the heir at law to discover the circumstances attending

<sup>1</sup> Prac. Reg. 326, Wy. ed. And see Griffith v. Bateman, Finch, 334.

<sup>2</sup> Cary Rep. 61; Prac. Reg. 327, Wy. ed.; Att. Gen. v. Lord Hotham, 1 Turn. R. 209. See below, Chap. II, sec. 2, part 3.

<sup>3</sup> 1 Ves. jr. 292; and see Ibid. p. 294, note.

<sup>4</sup> Plummer v. May, 1 Ves. 426.

<sup>5</sup> See the case of Turner v. Robinson, 1 Sim. & Stu. 3.

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\* Where a creditor of a testator files a bill stating that the defendant is the executor, and has proved the will, and that he sets up a voluntary assignment made by the testator to him; and charging that whether he has proved the will or not, he has taken possession of the personal estate, and is accountable for the same; and praying that the deed may be declared to be void, and that an account may be taken of the personal estate come to the hands of the defendant; a plea that the defendant is not executor is a good plea to the whole bill. (Hill v. Neale, 5 Law J. [O. S.] 144, V. C.)

† A plea of a defective title by a vendor to a bill filed by a purchaser for a specific performance is bad. (Thomas v. Dering, 4 Law J. [N. S.] 149, M. R.)

the execution, and the bill contained a charge of pretense of interest by the defendant, though a demurrer for want of interest was overruled because it admitted the truth of the charge to the contrary in the bill, yet the court declared an opinion that a defense might have been made by a plea.<sup>1</sup>

IX: Though the subject of a suit may be within the jurisdiction of a court of equity, and the Court of Chancery may have the proper jurisdiction; though the plaintiff may be under no personal disability, and may be the person he pretends to be, and have a claim of interest in the subject, and a right to call on the defendant concerning it, and the defendant may be the person he is stated to be, and may claim an interest in the subject which may make him liable to the plaintiff's demands, with respect to which circumstances pleas have been already considered, still the plaintiff, by reason of some additional circumstance, may not be entitled in the whole or in part to the relief or assistance which he prays by his bill. The objections which may be made to the whole or any part of a suit, though liable to none of the objections before considered, are principally the subject of those kinds of pleas which are commonly termed pleas in bar, and which are usually ranked under the heads of pleas of matter recorded, or as of record, in the court itself, or some other court of equity; pleas of matters of record, or matters in the nature of matters of record, in some court not a court of equity; and pleas of matters *in pais*.

Pleas in bar of matters recorded, or as of record, .

<sup>1</sup> Plummer v. May, 1 Ves. 426. This must have been a negative plea. And 238; s. c. 1 Ves. jr. 292; 7 Ves. 289, 290; 1 Ves. & Bea. 550; Turner v. see Cartwright v. Hatley, 3 Bro. C. C. Robinson, 1 Sim. & Stu. 3.

in the court itself, or some other court of equity, may be, 1. A decree or order of the court by which the rights of the parties have been determined;<sup>1</sup> or another bill for the same cause dismissed;<sup>2</sup> 2. Another suit depending in the court, or in some other court of equity, between the same parties for the same cause.<sup>3</sup> Pleas of this nature generally go both to the discovery sought and the relief prayed by the bill.

A decree,\* determining the rights of the parties, and signed and enrolled, may be pleaded to a new bill for the same matter,<sup>4</sup> and this even if the party bringing the new bill was an infant at the time of the former decree;<sup>5</sup> for a decree enrolled can only be altered upon a bill of review.<sup>6</sup> But the decree must be in its nature final, or afterwards made so by order, or it will not be a bar.<sup>7</sup> Therefore a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a bill to redeem, unless there is a final order of foreclosure;<sup>8</sup> nor can a decree which has been made upon default of the defendant in not appearing at the hearing be pleaded without an order making the decree absolute; the terms of such a decree being always that it shall be binding on the defendant, unless on being served with a writ of subpoena for the purpose he shall show cause to the contrary.<sup>9</sup> Upon a plea of this nature, so

<sup>1</sup> 3 Atk. 626.

<sup>2</sup> *Pritman v. Pritman*, 1 Vern. 310; *seq.*  
1 Atk. 571.

<sup>3</sup> *Foster v. Vasall*, 3 Atk. 587.

<sup>4</sup> *Rutland v. Brett*, Finch R. 124;  
*Mallock v. Galton*, Dick. 65.

<sup>5</sup> 1 Atk. 631; *Gregory v. Molesworth*, 3 Atk. 626; 3 Ves. 317.

<sup>6</sup> 3 Atk. 627. See above, pp. 181, *et*

<sup>7</sup> See next page, notes 4 and 5.

<sup>8</sup> *Senhouse v. Earl*, 2 Ves. 450.

<sup>9</sup> Ord. in Chan. 198, ed. Bea. And  
see *Halsey v. Smith*, Mos. 186; *Venemore v. Venemore*, Dick. 93.

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\* A plea to a creditor's bill, of a decree obtained by other creditors in a former suit will be overruled, where that decree is less beneficial to the plaintiffs in the second suit than the decree they might obtain in such second suit. (*Pickford v. Hunter*, 5 Sim. 122.)

much of the former bill and answer must be set forth as is necessary to show that the same point was then in issue.<sup>1</sup> A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill<sup>2</sup> \* if the dismissal was upon hearing, and was not in terms directed to be without prejudice.<sup>3</sup> But an order of dismissal is a bar only where the court determined that the plaintiff had no title to the relief sought by his bill; and therefore an order dismissing a bill for want of prosecution is not a bar to another bill.<sup>4</sup> And a decree cannot be pleaded in bar of a new bill unless it is conclusive<sup>5</sup> of the rights of the plaintiffs in that bill, or of those under whom they claim.<sup>6</sup> Therefore a decree against a mortgagor, and order of foreclosure enrolled, were not deemed a bar to a bill by intervening incumbrancers to redeem, although the mortgagee had no notice of those incumbrances; and the mortgagee having been long in possession, the account taken in the former cause was not deemed conclusive against the plaintiffs in the new bill, though under the circumstances the court, on overruling the plea and ordering the defendant to answer, limited the order by directing that the defendant should answer to charges of errors or omissions, but that the plaintiffs

<sup>1</sup> *Child v. Gibson*, 2 Atk. 603. But see 1 Vern. 310.

<sup>2</sup> *Pritman v. Pritman*, 1 Vern. 310; *Madge v. Brett, Finch*, 46; *Connell v. Warren*, Ib. 239; *Earl of Peterborough v. Germaine*, 6 Bro. P. C. 1, Toml. ed.

<sup>3</sup> *Seymour v. Nosworthy*, 1 Cas. in Chan. 155; *Toth*, 50.

<sup>4</sup> *Brandlyn v. Ord*, 1 Atk. 571; 14 Ves. 232.

<sup>5</sup> See *Coysgarne v. Jones*, Ambl. 613; *Collins v. Gough*, 4 Gwill. T. C. 1294.

<sup>6</sup> See *Doyly v. Smith*, 2 Cas. in Chan. 119; *Godfrey v. Chadwell*, 2 Vern. 601; *Atkinson v. Turner*, 3 Barn. 74.

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\* Where a demurrer by one of the assignees of a bankrupt to a bill against the assignees for a general account of their dealings under the bankruptcy has been allowed, it may be pleaded by the other assignee in bar of the suit. (*Tarleton v. Hornby*, 1 Y. & C. Eq. Ex. 333.)



should not unravel the account at large before the hearing.<sup>1</sup>

A decree must be signed and enrolled, or it cannot be pleaded in bar of a suit,<sup>2</sup> though it may be insisted upon by way of answer.<sup>3</sup> But though it cannot be pleaded directly in bar of the suit for want of enrollment, it may perhaps be pleaded, to show that the bill was exhibited contrary to the usual course of the court, and ought not therefore to be proceeded upon.<sup>4</sup> For if the decree appeared upon the face of the bill, the defendant might demur,<sup>5</sup> a decree not signed and enrolled being to be altered only upon a rehearing,<sup>6</sup> as a decree signed and enrolled can be altered only upon a bill of review.<sup>7</sup>

If a bill is brought to impeach a decree on the ground of fraud used in obtaining it, which, as has been observed,<sup>8</sup> may be done without the previous leave of the court, the decree may be pleaded in bar of the suit, with averments negating the charges of fraud, supported by an answer fully denying them.<sup>9</sup> Whether averments negating the charges of fraud are necessary to a plea of this description appears to have been a question much agitated in recent cases ;<sup>10</sup>

<sup>1</sup> *Morrett v. Western*, 15th July, 1710, in Chan. reported 2 Vern. 663.

<sup>2</sup> *Anon.* 3 Atk. 809; *Kinsey v. Kinsey*, 2 Ves. 577.

<sup>3</sup> 2 Ves. 577. And see *Charles v. Rowley*, 2 Bro. P. C. 485, Toml. ed.

<sup>4</sup> See 2 Ves. 577, note; Chan. Pleas, 89.

<sup>5</sup> *Wortley v. Birkhead*, 3 Atk. 809; s. c. 2 Ves. 571; *Lady Granville v. Ramsden*, Bunbury, 56.

<sup>6</sup> 2 Ves. 598. See above, pp. 187, 190.

<sup>7</sup> *Read v. Hambey*, 1 Cas. in Chan. 44; s. c. 2 Freem. 179. See above, p. 329, note 5.

<sup>8</sup> Pages 190, 191.

<sup>9</sup> *Wichalse v. Short*, 3 Bro. P. C. 558, Toml. ed.; s. c. 2 Eq. Cas. Abr. 177,

and 7 Vin. Abr. 398, pl. 15; 3 P. Wms. 95; *Gilb. For. Rom.* 58; *Treatise on Frauds*, c. 18, p. 220; *Butcher v. Cole*, at the Rolls, 26 June, 1786, cited 1 Anstr. 99. See the cases of *Sidney v. Perry*, *Parkinson v. Lecras*, *Meadows v. Duchess of Kingston*, and *Devie v. Chester*, mentioned in pages 338, 344, 346, 352, 363. And see 6 Ves. 596; 2 Sch. & Lefr. 727; 5 Madd. 330; 6 Madd. 64.

<sup>10</sup> *Pope v. Bish*, 1 Anstr. Exch. 59; *Edmundson v. Hartley*, Ib. 97. And see *Bayley v. Adams*, 6 Ves. jr. 586. In the cases in the Court of Exchequer it seems to have been supposed that the answer in support of the plea overruled the plea. But an answer can only overrule a plea where it applies to matter

upon which it may be observed that, without such averments, if the decree were admitted by the bill, nothing would be put in issue by the plea. The question in the cause must be, not whether such a decree had been made, but whether such a decree having been made, it ought to operate to bar the plaintiff's demand. To avoid its operation the bill must allege fraud in obtaining it; and to sustain it as a bar the fact of fraud must be denied and put in issue by the plea. For upon the question whether the decree ought to operate as a bar, the fact of fraud is the only point upon which issue can be joined between the parties; and unless the plea covers the fact of fraud, it does not meet the case made by the bill; and on argument of the plea, the charge of fraud not being denied by the plea, must be taken to be true. If the bill states the decree only as a pretense of the defendant, which it avoids by stating that if any such decree had been made, it had been obtained by fraud, the decree must be pleaded, because the fact of the decree is not admitted by the bill; and the charge of fraud must also be denied by the plea for the reasons before stated. If the bill states the decree absolutely, but charges fraud to impeach it, yet the decree must be pleaded, because decree if not avoidable, is alone the bar to the suit; and the fraud by which the bar is sought to be avoided must be met by negative averments in the plea, because without such averments the plea would admit the decree to have been obtained by fraud, and would therefore admit that it formed no bar. When issue is joined upon such a plea, if the decree is admitted by

which the defendant by his plea declines to answer, demanding the judgment of the court whether, by reason of the matter stated in the plea, he ought

to be compelled to answer so much of the bill. See *Arnold's Case*, *Gilb. For. Rom.* 58.

the bill, the only subject upon which evidence can be given is the fact of fraud. If that should be proved, it would open the plea on the hearing of the cause; and the defendant would then be put to answer generally, and to make defense to the bill as if no such decree had been made. The object of the plea is to prevent the necessity of entering into that defense by trying first the validity of the decree. If the evidence of fraud should fail, the decree, operating as a bar, would determine the suit as far as the operation of the decree would extend.

It has also been objected that a plea of the decree is a plea of the matter impeached by the bill; but the frame of a bill in equity necessarily produces, in various instances, this mode of pleading.<sup>1</sup> If the bill stated the title under which the plaintiff claimed, without stating the decree by which it had been affected, the defendant might have pleaded the decree alone in bar. If the bill stated the plaintiff's title, and also stated the decree, and alleged no fact to impeach it, and yet sought relief founded on the title concluded by it, the defendant might demur; because upon the face of the bill the title of the plaintiff would appear to be so concluded. But as in the form of pleading in equity the bill may state the title of the plaintiff, and at the same time state the decree by which, if not impeached, that title would be concluded, and then avoid the operation of the decree by alleging that it had been obtained by fraud; if the defendant could not take the judgment of the court upon the conclusiveness of the decree by plea upon which the matter by which that decree was impeached would alone

<sup>1</sup> See 3 P. Wms. 317, where Lord Chancellor Talbot is stated to have interrupted the counsel, who objected to this mode of pleading, observing that it was every day's practice.

be in issue, he must enter into the same defense (by evidence as well as by answer) as if no decree had been made: and would be involved in all the expense and vexation of a second litigation on the subject of a former suit, which the decree, if unimpeached, had concluded. It is therefore permitted to him to avoid entering into the general question of the plaintiff's title as not affected by the decree, by meeting the case made by the plaintiff, which can alone give him a right to call for that defense, namely, the fact of fraud in obtaining the decree. This has been permitted to be done in the only way in which it can be done, by pleading the decree with averments denying the fraud alleged; and those averments being the only matter in issue, they are necessarily of the very substance of the plea. The decree if obtained by fraud would be no bar; and nothing can be in issue on a plea but that which is contained in the plea; and every charge in the bill not negatived by the plea is taken to be true on argument of the plea. If therefore the decree merely were pleaded, on argument of the plea, the charge of fraud must be taken to be true, and the plea ought therefore to be overruled; but if on argument the plea were allowed, or if the plaintiff, without arguing, replied to the plea, no evidence could be given on the charges of fraud to avoid the plea, and the defendant proving his plea,<sup>1</sup> that is, proving the decree and nothing more, would be entitled to have the bill dismissed at the hearing.<sup>2</sup>

<sup>1</sup> Sir Joseph Jekyll, *M. R.* 3 P. Wms. 95.

<sup>2</sup> Perhaps all the difficulties which have arisen upon this subject have proceeded from want of attention to the form of pleadings in courts of equity, especially since the disuse of special replications, rejoinders, sur-rejoinders,

&c. When those pleadings were allowed, the plaintiff might have stated his case, without suggesting that it had been affected by any decree; if the defendant pleaded a decree binding the right, the plaintiff might have replied, that the decree had been obtained by fraud, by which the plaintiff would have

As the averments negating the charges of fraud are used merely to put the fact of fraud, as alleged by the bill, in issue on the plea, they may be expressed in the most general terms, provided they are sufficient to put the charges of fraud contained in the bill fully in issue. And as the plaintiff is entitled to have the answer of the defendant upon oath to any matter in dispute between them, in aid of proof of the case made by the bill, the defendant must answer to the facts of fraud alleged in the bill so fully as to leave no doubt in the mind of the court that upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established.<sup>1</sup> If the answer should not be full in all material points, the court may presume that the fact of fraud may be capable of proof in the point not fully answered, and may therefore not deem the answer sufficient to support the plea as conclusive, and therefore may overrule the plea absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause. But though the answer may be deemed sufficient to support the plea upon argument, the plaintiff may except to the answer, if he conceives it not to be so full to all the charges as to be free from exception; or by amending his bill may require an answer to any matter which may not have been so extensively stated or interrogated to as the case would warrant, or to which he may apprehend

admitted that the decree was a bar, if not capable of impeachment on the ground of fraud; the defendant by rejoinder would have avoided the charge of fraud, and sustained the decree; and then the issue would have been simply on the fact of fraud. As to this class of pleas, see Gilbert's *Forum Romanum*, 54-64, Am. ed. See also the *Dissertation on Pleading* prefixed to this edition.

<sup>1</sup> It seems to have been imagined

that there was something incongruous in a plea, and answer in support of the plea, 6 Ves. 597. But this objection seems to have arisen from a supposition that the answer formed part of the defense. It is no part of the defense, but that evidence which the plaintiff has a right to require, and to use to invalidate the defense made by the plea, upon argument of the plea, before other evidence can be given.

that the answer, though full in terms, may have been in effect evasive.

As the bill must be founded on the supposition that the plaintiff's title is not concluded by the decree, and the plea on the contrary supposition, the effect of the plea is, to conclude the whole case made by the bill, so far as it may be concluded by the decree, except the question of fraud; and consequently all the questions which might have been raised, if the decree had not been made, are put by the plea, if allowed, wholly out of the cause, unless the plea should be shown to be false in fact by evidence given on the issue taken upon it, and the matter of the plea thus opened upon the hearing. It is therefore a mistake to suppose that the plea, if sustained, would not shorten the cause, or lessen expense.<sup>1</sup>

As the ground of this defense by plea of a decree is that the matter has been already decided, a decree of any court of equity, in its nature final, or made so by subsequent order, may be pleaded in bar of a new suit.<sup>2</sup>

2. Another suit depending in the same or another court of equity for the same cause<sup>3</sup> is a good plea;<sup>4</sup> \* except, perhaps, in the case of a suit de-

<sup>1</sup> The argument which is contained in the few preceding pages of the text, and the notes thereto, has been adopted and established by decided cases; but these not relating to decrees, they will be adduced hereafter in illustration of the doctrines relating to the several pleas or legal bars sought to be set aside upon equitable grounds, with reference to which they have been respectively determined. See, however, here, 2 Ves. & B. 364; 6 Madd. 64, and 2 Sim. & Stu. 279.

<sup>2</sup> *Geale v. Wyntour*, Bunb. 211; *Wing v. Wing*, 10 Mod. R. 102; Anon.

Mos. 268; *Pritman v. Pritman*, 1 Vern. 310; *Fitzgerald v. Fitzgerald*, 5 Bro. P. C. 567, Toml. ed; but, as to the authority of this particular case, except in principle, see stat. 23 Geo. III, c. 28, and stat. 39 & 40 Geo. III, c. 67, art. 8. See also *Pitcher v. Rigby*, 9 Pri. Ex. R. 79.

<sup>3</sup> Ord. in Chan. ed. Bea. 26, 176; *Crofts v. Wortley*, 1 Cas. in Chan. 241; *Foster v. Vassall*, 3 Atk. 587; *Bell v. Read*, Ibid. 590; *Murray v. Shadwell*, 17 Ves. 353.

<sup>4</sup> It seems, that the pendency of another suit for the same cause, in a

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\* A suit instituted by husband and wife against the trustees of her separate property in respect of a fraud, cannot be pleaded in bar to a sub-

pending in an inferior court of equity, the effect of which the defendant has avoided by going out of the jurisdiction of that court.<sup>1</sup> The plea must aver that the second suit is for the same matter as the first; and therefore a plea which did not expressly aver this, though it stated matter tending to show it, was considered as bad in point of form, and overruled upon argument.<sup>2</sup> The plea must also aver that there have been proceedings in the suit, as appearance, or process requiring appearance at the least.<sup>3</sup> It seems likewise regular to aver that the suit is still depending;<sup>4</sup> though as a plea of this nature is not usually argued, but being clearly a good plea if true, is referred to the examination and inquiry of one of the masters of the court as to the fact,<sup>5</sup> it has been held

court of concurrent equity jurisdiction, cannot, before a decree has been made in such other suit, be pleaded in bar; see *Houlditch v. Marquis of Donegall*, 1 Sim. & Stu. 491; but, that where the parties in both courts are the same, it may be pleaded for the purpose of obtaining a reference to a master, to inquire whether the suits are for the same matter; see *Murray v. Shadwell*, 17 Ves. 353; and of getting a decision, upon his report of the fact, as to the validity of the plea, and consequently a determination of the question whether the plaintiff should or should not be allowed to proceed in the suit in which

the plea has been filed. Barn. 85. And see on this subject generally, *Umlin v. —*, 1 Vern. 332; 1 Ves. 545; *Daniel v. Mitchell*, 3 Bro. C. C. 544; *Anon.* 1 Ves. jr. 484; 2 Ves. & B. 110; *Jackson v. Leaf*, 1 Jac. & W. 229.

<sup>1</sup> See *Morgan v. —*, 1 Atk. 408. See also *Foster v. Vassall*, 3 Atk. 587, and *Lord Dillon v. Alvares*, 4 Ves. 357.

<sup>2</sup> Devie against Lord Brownlow, in Chan. 23d July, 1783, rep. Dick. 611.

<sup>3</sup> *Anon.* 1 Vern. 318; *Moor v. Welsh* Copper Comp. 1 Eq. Cas. Abr. 39.

<sup>4</sup> 3 Atk. 589.

<sup>5</sup> Ord. in Chan. ed. Bea. 176, 177; 2 Ves. & Bea. 110.

sequent suit by her and her next friend against her trustees and her husband and another person as parties to the fraud, although the relief prayed in both suits is the same, for the first suit is considered as the suit of the husband alone. (*Reeve v. Dalby*, 2 Sim. & Stu. 464.)

In the case of a plea of a former suit depending, where the former suit is for relief in respect of legal and equitable waste, but no evidence has been entered into with regard to the equitable waste, and the decree makes no decision respecting it, and the latter suit is exclusively for relief in respect of equitable waste, a plea of the former suit depending is bad; for the purpose sought to be attained by the latter suit cannot be attained by the former. (*Newdigate v. Newdigate*, 8 Law J. [O. S.] Ch. R. 35.)

that a positive averment that the former suit is depending is not necessary.\* And if the plaintiff sets down the plea to be argued, he admits the truth of the plea that a former suit for the same matter is depending, and the plea must therefore be allowed<sup>2</sup> unless it is defective in form.<sup>3</sup> As the pendency of the former suit, unless admitted by the plaintiff, is made the immediate subject of inquiry by one of the masters, a plea of this kind is not put in upon oath.<sup>4</sup>

It is not necessary to the sufficiency of the plea that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold.<sup>5</sup> So where one part owner of a ship filed a bill against the husband for an account, and afterwards the same part owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last;<sup>6</sup> for though the first bill was insufficient for want of parties, yet by the second bill

<sup>1</sup> *Umlin v. —*, 1 Vern. 332.

<sup>2</sup> 1 Vern. 332; *Anon.* 1 Ves. jr. 484; *Daniel v. Mitchell*, 3 Bro. C. C. 544.

<sup>3</sup> This is founded on a general order of the court, that the plaintiff shall not be put to argue such a plea, but may obtain, in the first instance, an order of reference to a master to inquire into the truth of it. *Ord. in Chan. ed. Bea.* 176, 177; *Baker v. Bird*, 2 Ves. jr. 672; *Murray v. Shadwell*, 17 Ves. 353; 2 Ves. & Bea. 110; *Carwick v. Young*, 2

*Swanst.* 239; *Carrick v. Young*, 4 Madd. 437. See 3 Atk. 589, as to defects in the form of such a plea.

<sup>4</sup> 1 Vern. 332. This, however, can scarcely be deemed to extend to a case of a suit depending in a foreign court. And see *Forster v. Vassall*, 3 Atk. 587.

<sup>5</sup> *Moor v. Welsh Copper Comp.* 1 Eq. Cas. Abr. 39.

<sup>6</sup> *Durand v. Hutchinson*, Mich. 1771, in Chan.

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\* A plea of proceedings in another court must show not only that the subject-matter is the same, and the issue the same, but also that the object is the same; and that the court is a court of competent jurisdiction; and that the result of the proceedings therein would be conclusive, so as to bind every other court. (*Behrens v. Sieveking*, 2 My. & Cr. 602.)



the defendant was doubly vexed for the same cause. The course which the court has taken where the second bill has appeared to embrace the whole subject in dispute more completely than the first, has been to dismiss the first bill with costs, and to direct the defendant in the second cause to answer upon being paid the costs of a plea allowed,<sup>1</sup> which puts the case on the second bill in the same situation as it would have been in if the first bill had been dismissed before filing the second. Where a second bill is brought by the same person for the same purpose, but in a different right, as where the executor of an administrator brought a bill, conceiving himself to be the personal representative of the intestate, and afterwards procured administration *de bonis non*, and brought another bill,<sup>2</sup> the pendency of the former bill is not a good plea. The reason of this determination seems to have been, that the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the former suit; for a man coming under a decree is *quasi* a party.<sup>3</sup> The proper way for a creditor in such a situation to proceed, if the plaintiff in the original suit is dilatory, is by application to the court for liberty to conduct the cause.<sup>4</sup>

<sup>1</sup> Crofts v. Wortley, 1 Cas. in Chan. 241.

<sup>2</sup> Huggins v. York Build. Comp. 2 Atk. 44.

<sup>3</sup> Neve v. Weston, 3 Atk. 557; 1 Sim. & Stu. 361.

<sup>4</sup> See Powell v. Walworth, 2 Madd. 183; Sims v. Ridge, 3 Meriv. 458; Edmunds v. Acland, 5 Madd. 31; Fleming v. Prior, 5 Madd. 423; Handford v. Storie, 2 Sim. & Stu. 195.

If a plaintiff sues a defendant at the same time for the same cause at common law and in equity, the defendant after answer put in<sup>1</sup> may apply to the court that the plaintiff may make his election\* where he will proceed,<sup>2</sup> but cannot plead the pendency of the suit at common law in bar of the suit in equity,<sup>3</sup> though the practice was formerly otherwise.<sup>4</sup> If the plaintiff shall elect to proceed in equity, the court will restrain his proceedings at law by injunction, and if he shall elect to proceed at law, the bill will be dismissed.<sup>5</sup> But if he should fail at law, this dismissal of his bill will be no bar to his bringing a new bill.<sup>6</sup>

Pleas in bar of matters of record, or of matters in the nature of matters of record, in some court not being a court of equity, may be—1, a fine; 2, a recovery; 3, a judgment at law, or sentence of some other court.

1. A plea of a fine and non-claim, though a legal bar, yet is equally good in equity<sup>7</sup>† provided it is

<sup>1</sup> 3 P. Wms. 90; 1 Ball & B. 119, 319; *Fisher v. Mee*, 3 Meriv. 45; *Hogue v. Curtis*, 1 Jac. & W. 449; *Browne v. Poyntz*, 3 Madd. 24; *Coupland v. Bradock*, 5 Madd. 14.

<sup>2</sup> 3 P. Wms. 90; *Anon.* 1 Ves. jr. 91; 1 Ball & B. 320; *Pieters v. Thompson*, Coop. R. 294. But there is a distinction in the practice where the court is unable at once to see that it is a case of election. See *Boyd v. Heinzelman*, 1 Ves. & Bea. 381; 2 Ves. & Bea. 110; *Mills v. Fry*, 3 Ves. & Bea. 9 (1814); — *v.* —, 2 Madd. 395; *Amory v. Brodrick*, 1 Jac. R. 530, and the cases therein cited. In the instance of a mortgagee taking the usual bond for repayment of the mortgage money, he is not bound to elect, but may proceed, under certain restrictions, upon his separate securities at law and in equity. *Schoole v. Sall*, 1 Sch. & Lefr. 176. But where the plaintiff sues in both jurisdictions in an indi-

vidual character, and can have in the former only a part of the relief which he can obtain in the latter; by instituting the suit in this court, he concludes himself from proceeding at law, and therefore of course is not entitled to the privilege of election. *Mills v. Fry*, 19 Ves. 277 (1815).

<sup>3</sup> 3 P. Wms. 90. And it should seem the pendency of a suit in an ecclesiastical court, for payment of a legacy, could not be pleaded to a bill for similar relief here. *Howell v. Waldron*, 1 Cas. in Chan. 85.

<sup>4</sup> Ord. in Chan. ed. Bea. 177.

<sup>5</sup> 3 P. Wms. 90, note; *Mousley v. Basnett*, 1 Ves. & Bea. 382, note; *Fitzgerald v. Sucomb*, 2 Atk. 85.

<sup>6</sup> *Countess of Plymouth v. Bladon*, 2 Vern. 32.

<sup>7</sup> *Thynne v. Townsend*, W. Jones, 416; *Salisbury v. Baggott*, 1 Cas. in Chan. 278; 2 Swanst. 610; *Watkins v. Stone*, 2 Sim. & Stu. 560.

\* On this subject, see 1 Perkins' Daniell's Ch. Pr. 791, *et seq.*

† A fine and non-claim cannot be pleaded to a bill to prevent the set-

pleaded with proper averments.<sup>1</sup> Where a title is merely legal, though the defect is apparent upon the face of the deeds, yet the fine will be a bar in equity; and a purchaser will not be affected with notice so as to make him a trustee for the person who had the right. For a defect upon the face of title deeds is often the occasion of a fine being levied.<sup>2</sup> And even a fine levied upon bare possession, with non-claim, may be a bar in equity, if a legal bar, though with notice at the time the fine was levied.<sup>3</sup> But with respect to equitable titles there is a distinction. For where the equity charges the land only, the fine bars,<sup>4</sup> but where it charges the person only in respect of the land,<sup>5</sup> the fine does not bar.<sup>6</sup> Therefore if a man purchases from a trustee, and levies a fine, he stands in the place of the seller, and is as much a trustee as the seller was,<sup>7</sup> provided he has notice of the trust, or is a

<sup>1</sup> *Story v. Lord Windsor*, 2 Atk. 630; *Hildyard v. Cressy*, 3 Atk. 303; *Page v. Levar*, 2 Ves. jr. 450; *Butler v. Every*, 1 Ves. jr. 136; s. c. 3 Bro. C. C. 80; *Dobson v. Leadbeater*, 13 Ves. 230. The object of the averments is of course to show that it was an effectual fine. 13 Ves. 233.

<sup>2</sup> 2 Atk. 631.

<sup>3</sup> *Brereton v. Gamul*, 2 Atk. 240.

<sup>4</sup> *Gifford v. Phillips*, cited 2 Swanst. 612.

<sup>5</sup> *Earl Kenoul v. Grevil*, cited 2 Swanst. 611; s. c. 1 Cas. in Chan. 295.

<sup>6</sup> 1 Cas. in Chan. 278; 2 Swanst. 611; and see 2 Atk. 390; 1 Sch. & Lefr. 381.

<sup>7</sup> 2 Atk. 631; *Kennedy v. Daly*, 1 Sch. & Lefr. 355.

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ting up of an outstanding term. For the person in whom the legal estate in a satisfied term is vested is a trustee for the real owner of the estate; and a court of equity will prevent the termor from setting up the term, so as to prevent the trial at law of the question who is the real owner of the estate. It will not take upon itself to decide that question by deciding upon the operation of the fine and non-claim; because if it should decide against the title by fine and non-claim, that title might be again tried at law. (*Leigh v. Leigh*, 1 Sim. 349.)

And to a bill by a plaintiff claiming as heir at law, and seeking a discovery, and an injunction to restrain the setting up of an outstanding term, a plea of a fine and conveyance in favor of the person under whom the defendant claims is a good defense both to the discovery and to the relief. (*Gait v. Osbaldeston*, 1 Russ. 158.)

purchaser without consideration.<sup>1</sup> So if the grantee of a mortgagee levies a fine, that will not discharge the equity of redemption.<sup>2</sup> But there are cases of equitable as well as legal titles, in which a fine and non-claim will bar, notwithstanding notice at the time of levying the fine.<sup>3</sup> It has been determined, however, that if a fine is levied where the legal estate is in trustees for an infant, and the trustees neglect to claim, the infant, claiming by bill within five years after he attains twenty-one, shall not be barred.<sup>4</sup> But perhaps this should be understood as referring to the case of a fine levied with notice of the title of the infant.<sup>5</sup> Where a title to lands is merely equitable, as in the case of an agreement to settle lands to particular uses, claim to avoid the fine must be by *subpœna*.<sup>6</sup> The pendency of a suit in equity will therefore in equity prevent in many cases the running of a fine.<sup>7</sup> Upon the whole, wherever a person comes in by a title opposite to the title to a trust estate,<sup>8</sup> or comes in under the title to the trust estate, for a valuable consideration, without fraud, or notice of fraud, or of the trust,<sup>9</sup> a fine and non-claim may be set up as a bar to the claim of a trust.<sup>10</sup> When a fine and non-claim are set up as a bar to a claim of a trust, by a person claiming under the same title, it is not sufficient to aver that at the time the fine was levied the seller of the estate, being seized,

<sup>1</sup> Gilb. For. Rom. 62; *Bovy v. Smith*, 2 Cas. in Chan. 124; s. c. 1 Vern. 60, and 1 Vern. 84; on rehearing, see 1 Vern. 144, the decree was reversed; but see 1 Sch. & Lefr. 379, 380.

<sup>2</sup> 2 Atk. 631; *contra*, 2 Freem. 21, 69; but see 1 Sch. & Lefr. 378, 380.

<sup>3</sup> 2 Atk. 361; *Hildyard v. Cressy*, 3 Atk. 303; *Shields v. Atkins*, 3 Atk. 560.

<sup>4</sup> *Allen v. Sayer*, 2 Vern. 368.

<sup>5</sup> *Wyche v. E. I. Comp.* 3 P. Wms.

309; *Earl v. Countess of Huntingdon*, Ibid. 310, note G.

<sup>6</sup> *Salisbury v. Baggott*, 1 Cas. in Chan. 278; s. c. 2 Freem. 21, and more accurately reported, from Lord Nottingham's MSS. 2 Swanst. 603.

<sup>7</sup> 2 Atk. 389, 390; *Pincke v. Thornycroft*, 1 Bro. C. C. 289; s. c. 4 Bro. P. C. 92, Toml. ed.; 1 Sch. & Lefr. 432.

<sup>8</sup> *Stoughton v. Onslow*, cited 2 Swanst. 615; and 1 Freem. 311.

<sup>9</sup> 1 Sch. & Lefr. 380.

<sup>10</sup> Gilb. For. Rom. 63.

or pretending to be seized, conveyed; but it is necessary to aver that the seller was actually seized. It is not, indeed, requisite to aver that the seller was seized in fee; an averment that he was seized *ut de libero tenemento*, and being so seized a fine was levied, will be sufficient.<sup>1</sup> A fine and non-claim may be pleaded in bar to a bill of review.\*

2. To a claim under an entail, a recovery duly suffered, with the deed to lead the uses of that recovery, may be pleaded, if the estate limited to the plaintiff, or under which he claims, is thereby destroyed.<sup>3</sup>\*

3. If the judgment of a court of ordinary jurisdiction has finally determined the rights of the parties, the judgment may in general be pleaded in bar of a bill in equity.<sup>4</sup> Thus where a bill was brought by a person claiming to be son and heir of Joscelin, Earl of Leicester, and alleged that the earl, being tenant in tail of estates, had suffered a recovery, and had declared the use to himself and a trustee in fee, and that the plaintiff

<sup>1</sup> 2 Atk. 630; 2 Sch. & Lefr. 99. And see the cases cited above, p. 341, note 1.

<sup>2</sup> Lingard v. Griffin, 2 Vern. 189.

<sup>3</sup> Att. Gen. v. Sutton, 1 P. Wms. 754; Salkeld against Salkeld, 1763, before Lord Northington; Brown v. Williamson, Trin. 1772, before Lord Bathurst.

<sup>4</sup> See Throckmorton v. Finch, 4 Co. Inst. 86; s. c. cited also in a tract published at end of 1 Rep. in Chan. on

Jurisd. of the Court of Chan.; Hunby v. Johnson, 1 Rep. in Chan. 243; Bluck v. Elliot, Finch, 13; Pitt v. Hill, Finch, 70; Temple v. Baltinglass, Finch, 275; Cornell v. Ward, Finch, 239; Wilcox v. Sturt, 1 Vern. 77; Bissell v. Axtell, 2 Vern. 47; Penvill v. Luscombe (1728) rep. 2 Jac. & W. 201; 3 Bro. C. C. 72; 1 Sch. & Lefr. 204; Ord. in Chan. 19, Ed. Bea.

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\* Where a plaintiff claims as heir at law of a person who devised estates tail, reserving the ultimate reversion to her own right heirs, and the bill alleges that no valid recovery was suffered, or if it were, that the property was so settled that the plaintiff is entitled as heir of the testator; a plea which sets forth the substance of the recovery and of the deeds making the tenant to the præcipe and leading the uses of the recovery, showing that a recovery was suffered by the tenant for life and the ultimate remainder-man in tail, to the use of another person in fee, is a good defense, although not supported by any answer. (Plunkett v. Cavendish, 1 Russ. & My. 713.)

had brought a writ of right to recover the lands, but the defendant had possession of the title deeds, and intended to set up the legal estate which was vested in the trustee, and prayed a discovery of the deeds, and that the defendant might be restrained from setting up the estate in the trustee, the defendant pleaded, as to the discovery of the deeds and relief, judgment in her favor in the writ of right; and averred that the title in the trustee, which the bill sought to have removed, had not been given in evidence; and the plea was allowed.<sup>1</sup> In this case the bill was brought before the trial in the writ of right, and the plaintiff had proceeded to trial without the discovery and relief sought by his bill for the purposes of the trial. The plea was subsequent to the judgment. It may be doubted therefore whether the averment that the title in the trustee had not been given in evidence on the trial of the writ of right was necessary, as the judgment was a bar, as a release subsequent to the filing of the bill would have been; and if the plaintiff could have avoided the effect of the judgment because the title in the trustee had been given in evidence, it should seem that that fact, together with the fact of the judgment, ought to have been brought before the court by another bill in the nature of a bill for a new trial, either as a supplemental bill, or as an original bill, the former bill being dismissed.<sup>2</sup>

To a bill to set aside a judgment, as obtained against conscience,<sup>3</sup> the defendant has been per-

<sup>1</sup> Sidney, styling himself Earl of Leicester, against Perry, in Chan. 23d July, 1783.

<sup>2</sup> Respecting the dispute in the time of Lord Ellesmere, raised by Lord Coke, upon the question whether a court of equity could give relief after a judgment at law, see 3 Blackst. Comm.

p. 54; Gilb. For. Rom. 56; and the Tract on the Jurisdiction of the Court of Chancery, comprising the order of the king (James I) on the subject, published at the end of 1 Rep. in Chan. ed. 1715, and that order at end of Cary's Rep. ed. 1650.

<sup>3</sup> 2 Ves. jr. 135.

mitted to plead the verdict and judgment in bar;<sup>1</sup> but it may be doubted whether in this case the defendant might not have demurred to the bill, as there does not appear to have been any charge in the bill requiring averment to support the plea. A sentence of any,<sup>2</sup> even a foreign court,<sup>3</sup> may be a proper defense by way of plea; but the court pronouncing the sentence must at least have had full jurisdiction to determine the rights of the parties.<sup>4</sup> \* If there is any charge of fraud, or other circumstance shown as a ground for relief, the judgment or sentence cannot be pleaded,<sup>5</sup> unless the fraud or other circumstance, the ground upon which the judgment or sentence is sought to be impeached, be denied, and thus put in issue by the plea, and the plea supported by a full answer to the charge in the bill.<sup>6</sup> Upon this principle the Court of Exchequer determined upon a bill brought by insurers of part of the property taken on board the Spanish ships at Omoa. The bill charged that the navy, on whose behalf, as captors, the defendants had insured, were not the real captors, or not the only captors; that the Spanish ships struck to the land forces; and that although the Court of Admiralty

<sup>1</sup> Williams *v.* Lee, 3 Atk. 223. And see Sewel *v.* Freeston, 1 Cas. in Chan. 65; Shuter *v.* Gilliard, 2 Cas. in Chan. 250; Armsted *v.* Parker, Finch, 171; Huddleston *v.* Asbugg, Finch, 171; Anon. 3 Rep. in Chan. 25.

<sup>2</sup> See the cases referred to page 343, note 4.

<sup>3</sup> See Newland *v.* Horseman, 1 Vern. 21; s. c. 2 Cas. in Chan. 74; Burrows *v.* Jemineau, Sel. Cas. in Chan. 69; s. c. Mos. 1; Dick. 48; Gage *v.* Bulkeley, 3

Atk. 215; s. c. 2 Ves. 556; White *v.* Hall, 12 Ves. 320.

<sup>4</sup> Gage *v.* Bulkeley, 2 Atk. 215.

<sup>5</sup> See 2 Cas. in Chan. 251; and see the tract and order referred to in last page, at the end of 1 Rep. in Chan. and of Cary's Rep.; and see 2 Ves. jr. 135.

<sup>6</sup> 6 Ves. 596. As to the necessity of these averments in the plea, and the support of the plea by answer, see pp. 331 *et seq.*

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\* A plea of a foreign judgment must show that the general fact which is stated by the plaintiff, as the ground of equity was decided by a foreign court of competent jurisdiction not to be a ground of equity. (Garcias *v.* Ricardo, 14 Sim. 265).

had condemned the ships taken as prizes to the navy, yet that condemnation had been obtained in consequence of the king's procurator general having withdrawn a claim made on behalf of the crown at the instance of the land forces, and of an agreement between the sea and land forces to make a division of the treasure; and that the sentence was therefore, as against the plaintiffs, the insurers, not conclusive. The defendants pleaded the sentence of the admiralty, both to discovery of the facts stated in the bill, and to the relief prayed. The plea was in many respects informal, but the court was of opinion that the sentence thus impeached could not be pleaded in bar to the discovery sought by the bill, and that, as a bar to relief, it ought to have been supported by averments negating the grounds on which it was impeached by the bill.<sup>1</sup>

A will and probate, even in the common form in the proper ecclesiastical court, which is in the nature of a sentence,<sup>2</sup> is a good plea to a bill by persons claiming as next of kin to a person supposed to have died intestate.<sup>3</sup> And if fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach the probate; for the parties may resort to the ecclesiastical court, which is competent to determine upon the question of fraud.<sup>4</sup> But where the fraud practiced has not gone to the whole will, but only to some particular clause, or if fraud has been practiced to obtain the consent of next of kin to the probate,<sup>5</sup> the courts

<sup>1</sup> Parkinson against Lecras, 23d Feb. 1781.

<sup>2</sup> See 1 Atk. 516.

<sup>3</sup> Jauncy v. Sealey, 1 Vern. 397.

<sup>4</sup> Archer v. Mosse, 2 Vern. 8; Nelson v. Oldfield, 2 Vern. 76; Att. Gen. v. Ryder, 2 Cas. in Chan. 178; Plume v. Beale, 1 P. Wms. 388; 2 P. Wms. 287; 2 Atk. 324; Kerrick v. Bransby, 7 Bro.

P.C. 437, Toml. ed.; Meadows v. Duchess of Kingston, Mich. 1777, reported Ambl. 756; 5 Ves. 647; Griffiths v. Hamilton, 12 Ves. 298.

<sup>5</sup> As to the kind of relief which may be given where a probate has been obtained by fraud, see Barnesley v. Powel, 1 Ves. 284.



of equity have laid hold of these circumstances to declare the executor a trustee for the next of kin.<sup>1</sup> Where there are no such circumstances the probate of the will is a clear bar to a demand of personal estate;<sup>2</sup> and where a testator died in a foreign country, and left no goods in any other country, probate of his will according to the law of that country was determined to be sufficient against an administration obtained in England.<sup>3</sup>

Pleas in bar of matters *in pais* only sometimes go both to the discovery sought, and to the relief prayed by the bill, or by some part of it; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief, or part of the relief.

Pleas of this nature (which may go both to the discovery and relief sought by the bill, or by some part thereof, but which sometimes extend no farther than the relief) are principally: 1. A plea of a stated account; 2. Of an award; 3. A release; 4. Of a will or conveyance, or some instrument controlling or affecting the rights of the parties; 5. A plea of any statute which may create a bar to the plaintiff's demand, as the statute for prevention of frauds and perjuries, or the statutes for limitation of actions, which may be considered as a plea of matter *in pais*; for though the statute itself is usually set forth in the plea, yet that perhaps is unnecessary, and the substance of the plea consists in the averment of matter necessary to bring the case within the particular statute; and therefore if those matters appeared on the face of the

<sup>1</sup> Marriot v. Marriot, in Exch. 1 Stra. 666, and argument of Ld. Ch. Baron Gilbert. Gilb. Cas. in Chan. 203; Ambl. 762, 763.

<sup>2</sup> 12 Ves. 307.

<sup>3</sup> Jauncy v. Sealey, 1 Vern. 397.

bill itself it may be presumed a demurrer would hold, though this has been doubted.

1. A plea of a stated account is a good bar to a bill for an account.<sup>1</sup> It must show that the account was in writing, or at least it must set forth the balance.<sup>2</sup> If the bill charges that the plaintiff has no counterpart of the account, the account should be annexed by way of schedule to the answer, that if there are any errors upon the face of it the plaintiff may have an opportunity of pointing them out.<sup>3</sup> If error<sup>4</sup> or fraud<sup>5</sup> is charged<sup>6</sup> it must be denied by the plea as well as by way of answer;<sup>7\*</sup> and if neither error nor fraud is charged, the defendant must by the plea aver

<sup>1</sup> Anon. 2 Freem. 62; 1 Vern. 180; Dawson v. Dawson, 1 Atk. 1; Sumner v. Thorpe, 2 Atk. 1; Penvil v. Luscombe (1728), rep. 2 Jac. & W. 201; Irvine v. Young, 1 Sim. & Stu. 333.

<sup>2</sup> 2 Atk. 399.

<sup>3</sup> Hankey v. Simpson, 3 Atk. 303.

<sup>4</sup> On the subject of this court's interference, where there is error in a settled account, see Anon. 2 Freem. 62; Proud v. Combes, 2 Freem. 183; s. c. 3 Rep. in Chan. 18; 1 Cas. in Chan. 55; 2 Freem. 183; Nels. 100; and 1 Eq. Cas. Abr. 12; Wright v. Coxon, 1 Cas. in Chan. 262; Bedell v. Bedell, Finch R. 5; Dawson v. Dawson, 1 Atk. 1; Bourke v. Bridgeman, 1 Barnard, 272; Roberts v. Kuffin, 2 Atk. 112; Pit v. Cholmondeley, 2 Ves. 565; Johnson v. Curtis, 3 Bro. C. C. 266; Gray v. Minnethorpe, 3 Ves. 103; Lord Hardwicke

v. Vernon, 4 Ves. 411; 5 Ves. 837; Kinsman v. Barker, 14 Ves. 262.

<sup>5</sup> As to its interference where the settlement of an account has been accompanied with fraud, see Vernon v. Vawdry, 2 Atk. 119; Newman v. Payne, 2 Ves. jr. 199; Wharton v. May, 5 Ves. 27; Beaumont v. Boulton, 5 Ves. 485; s. c. 7 Ves. 599; 11 Ves. 358; Langstaffe v. Taylor, 14 Ves. 262; Drew v. Power, 1 Sch. & Lefr. 182.

<sup>6</sup> 9 Ves. 265, 266.

<sup>7</sup> Gilb. For. Rom. 56; 1 Cas. in Chan. 299; 2 Freem. 62; 6 Ves. 596; Clarke v. Earl of Ormonde, 1 Jac. R. 116. And, it seems, if the plaintiff allege that he has no counterpart of the stated account, the defendant must annex a copy thereof to his plea. Hankey v. Simson, 3 Atk. 303. And see above, pp. 331 *et seq.*

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\* A plea of a legal bar (such as a full, true, and settled account, and a release) is defective if it does not explicitly negative, so as to give the plaintiff an issue on the plea to try, circumstances which are charged by the bill (such as fraud and collusion), and which, if true, would render the legal bar insufficient. And this is the case even though such matters are positively denied by an answer in support of the plea. (Phelps v. Sprowle, 1 My. & K. 231, decided by Lord Brougham, C., overruling the decision of the Vice Chancellor; Story Eq. Plea. s. 180, 754; 2 Sch. & Lefr. 635; 3 Johns. Ch. 384; 7 Johns. Ch. 134; s. c. Cowen, 360; 1 Daniel, Ch. Pl. & Tr. 618, n. 3, 4 Am. ed.)

that the stated account is just and true, to the best of his knowledge and belief.<sup>1</sup> The delivery up of vouchers at the time the account was stated seems to be a proper averment in a plea of this nature,<sup>2</sup> if the fact was such.<sup>3</sup>\*

2. An award may be pleaded to a bill to set aside the award and open the account;<sup>4</sup> and it is not only good to the merits of the case, but likewise to the discovery sought by the bill.<sup>5</sup> But if fraud or partiality is charged against the arbitrators,<sup>6</sup> the charge must not only be denied by way of averment in the plea, but the plea must be supported by an answer showing the arbitrators to have been incorrupt and impartial;<sup>7</sup> and any other matter stated in the bill as a ground for impeaching the award must be denied in the same manner.

3. If the plaintiff, or a person under whom he

<sup>1</sup> 3 Atk. 70; 1 Eq. Cas. Abr. 39; 2 Sch. & Lefr. 727. And see Matthews v. Walwyn, 4 Ves. 118; Middleditch v. Sharland, 5 Ves. 87.

<sup>2</sup> Gilb. For. Rom. 57; Walker v. Consett, Forrest's Exch. R. 157; Hodder v. Watts, 4 Pri. Exch. R. 8. And see Wharton v. May, 5 Ves. 27.

<sup>3</sup> 2 Atk. 252. See the case of Clarke v. Earl of Ormonde, 1 Jac. R. 116.

<sup>4</sup> Lingood v. Croucher, 2 Atk. 395; s. c. as Lingood v. Eade, 2 Atk. 501; Burton v. Ellington, 3 Bro. C. C. 196.

<sup>5</sup> Tittenson v. Peat, 3 Atk. 529; Anon. 3 Atk. 644. As to a plea of an award under an agreement to refer the matters in dispute to arbitration, en-

tered into after bill filed, see Dryden v. Robinson, 2 Sim. & Stu. 529; and see Rowe v. Wood, 1 Jac. & W. 348; s. c. 2 Bligh P. C. 595.

<sup>6</sup> As instances, see Ward v. Periam, cited 2 Atk. 396; 2 Ves. 316; s. c. reported 1 Turn. 131, note. Chicot v. Lequesne, 2 Ves. 315; 2 Ves. jr. 135; Reynell v. Luscombe, 1 Turn. 135, n.; Goodman v. Sayers, 2 Jac. & W. 249; Auriol v. Smith, 1 Turn. 121; Dawson v. Sadler, 1 Sim. & Stu. 537.

<sup>7</sup> 2 Atk. 396; 6 Ves. 594, 596; 2 Ves. & Bea. 364; and see Allardes v. Campbell, rep. 1 Turn. 133, note; s. c. Bunb. 265; Rybott v. Barrell, 2 Eden, 131.

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\* A plea, by a trustee, of a settled account and release, to inquiries as to the execution of a trust, is bad, if it does not aver that the matters inquired after appear from the account. And a plea of a settled account and release to a bill by a *cestui que trust* against a trustee will not protect the trustee from a discovery of vouchers. (Clarke v. The Earl of Ormonde, Jac. 116.)

claims, has released the subject of his demand, the defendant may plead the release in bar of the bill,<sup>1</sup>\* and this will apply to a bill praying that the release may be set aside.<sup>2</sup> In a plea of a release the defendant must set out the consideration upon which the release was made.<sup>3</sup> A plea of a release therefore cannot extend to a discovery of the consideration; and if that is impeached by the bill, the plea must be assisted by averments covering the grounds on which the consideration is so impeached. Thus, to a bill stating various transactions between the defendant and the testator of the plaintiff, and imputing to those transactions fraud and unfair dealing on the part of the defendant, and impeaching accounts of the transactions delivered by the defendant to the testator on the ground of errors, omissions, and unfair and false charges, and also impeaching a purchase of an estate conveyed by the testator to the defendant in consideration of part of the defendant's alleged demands, and praying a general account, and that the purchase of the estate might be set aside as fraudulently obtained, and the conveyance might stand as a security only for what was justly due

<sup>1</sup> *Bower v. Swadlin*, 1 Atk. 294; *Taunton v. Pepler*, 6 Madd. 166; *Clarke v. Earle of Ormonde*, 1 Jac. 116; And see *Roche v. Morgell*, 2 Sch. & Lefr. 721.

<sup>2</sup> *Fusey v. Desbouverie*, 3 P. Wms. 315. And with regard to this latter proposition, it may be remarked, that it is in like manner necessary that the defendant should deny the equitable circumstances charged for the purpose of impeaching the release, by averments

in his plea, and by an answer to the same effect. *Lloyd v. Smith*, 1 Anstr. Exch. R. 258; *Freeland v. Johnson*, 1 Anstr. Exch. R. 276; *Walter v. Glanville*, 5 Bro. P. C. 555, Toml. ed.; 2 Sch. & Lefr. 727; 6 Madd. 64; 2 Sim. & Stu. 279. †

<sup>3</sup> *Gilb. For. Rom.* 57; *Griffith v. Manser*, Hardr. 168; 2 Sch. & Lefr. 728; and see *Walter v. Glanville*, 5 Bro. P. C. 555, Toml. ed.

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\* To a bill by a husband and wife for property limited to the separate use of the wife, a plea of a release by the husband is a good plea. (*Stooke v. Vincent*, 1 Coll. 527.)

† See also *Parker v. Alcock*, 1 Y. & J. 432.

from the testator's estate to the defendant, a plea of a deed of mutual release, extending to so much of the bill as sought a discovery and prayed an account of dealings and transactions prior to and upon the day of the date of the deed of release, and all relief and discovery grounded thereupon, and stating the deed to have been founded on a general settlement of accounts on that day, and to have excepted securities then given to the defendant for the balance of those accounts which was in his favor, and averring only that the deed had been prepared and executed without any fraud or undue practice on the part of the defendant, was overruled. The consideration for the instrument was the general settlement of accounts; and if those accounts were liable to the imputations cast upon them by the bill,<sup>1</sup> the release was not a fair transaction, and ought not to preclude the court from decreeing a new account. The plea, therefore, could not be allowed to cover a discovery tending to impeach those accounts, and the fairness of the settled accounts was not put in issue by the plea, or supported by an answer denying the imputations charged in the bill.\* The plea indeed was defective in many other particulars necessary to support it against the charges in the bill; and to some parts of the case made by the bill the release did not extend.<sup>2</sup> A release pleaded to a bill for an account

<sup>1</sup> Though an account be stated under hand and seal, yet if there appear any mistake in it, the court will relieve. See the cases cited above, p. 348, note 4.

<sup>2</sup> *Roche v. Morgell*, 2 Sch. & Lefr. 721.

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\* In an answer in support of a plea, the defendant must answer all those matters in a bill, which, if true, would displace the plea, whether the bill does or does not expressly charge those matters to be evidence of the facts to which the plea relates. (*Chadwick v. Broadwood*, 3 Beav. 530.)

must be under seal;<sup>1</sup> a release not under seal must be pleaded as a stated account only.<sup>2</sup>\*

4. To a bill brought upon a ground of equity by an heir at law against a devisee, to turn the devisee out of possession, the devisee may plead the will, and that it was duly executed.<sup>3</sup> But in cases of this kind where the bill has also prayed a receiver, a plea extending to that part of the bill has been so far overruled, as it might be necessary for the court in the progress of the cause to appoint a receiver.<sup>4</sup> Upon a bill filed by an heir against a person claiming under a conveyance from the ancestor, the defendant may plead the conveyance in bar of the suit. To a bill by one partner in trade against his copartner for discovery and relief relative to the partnership transactions, a plea of the articles of partnership, by which it was agreed that all differences which might arise between the partners should be referred to arbitration, and that no suit should be instituted in law or equity until an offer should have been made to leave the matter in difference to arbitration, and that offer had been refused, has been allowed.<sup>5</sup> This case has been much questioned; and it now seems to be determined that such an agreement cannot be pleaded in bar of a suit,<sup>6</sup>

<sup>1</sup> But it need not be signed. *Taunton v. Pepler*, 6 Madd. 166.

<sup>2</sup> *Gilb. For. Rom.* 57.

<sup>3</sup> *Anon.* 3 Atk. 17; *Anstis v. Dowsing*, cited 2 Ves. 361; *Meadows v. Duch. of Kingston*, Mich. 1777, reported *Ambl.* 756; 3 Meriv. 171.

<sup>4</sup> *Anon.* 3 Atk. 17, and *Meadows v. Duch. of Kingston*. But see 2 Ves. 362, 363.

<sup>5</sup> *Halfhide v. Fenning*, 2 Bro. C. C. 336; *contra*, *Wellington v. Mackintosh*, 2 Atk. 569.

<sup>6</sup> *Satterly v. Robinson*, Exch. 17 Dec. 1791; *Michell v. Harris*, 4 Bro. C. C. 311; s. c. 2 Ves. jr. 129; *Street v. Rigby*, 6 Ves. jr. 815; 14 Ves. 270; *Waters v. Taylor*, 15 Ves. 10.

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\* The correct mode of pleading a release in bar of an account is to state it as being under seal; but it would seem that this is not indispensable. (*Phelps v. Sprowle*, 1 My. & K. 231.)

nor will the court compel a specific performance of the agreement.<sup>1</sup> Indeed it seems impossible to maintain that such a contract should be specifically performed, or bar a suit, unless the parties had first agreed upon the previous question, what were the matters in difference, and upon the powers to be given to the arbitrators, amongst which the same means of obtaining discovery upon oath, and production of books and papers, as can be given by a court of equity might be essential to justice. The nomination of arbitrators also must be a subject on which the parties must previously agree; for if either party objected to the person nominated by the other, it would be unjust to compel him to submit to the decision of the person so objected to as a judge chosen by himself. It must also be determined that all the subjects of difference, whether ascertained or not, must be fit subjects for the determination of arbitrators, which, if any of them involved important matter of law, they might not be deemed to be.

5. The statute for prevention of frauds and perjuries<sup>2</sup> may be pleaded in bar of a suit to which the provisions of that act apply.<sup>3</sup> This form of pleading generally requires negative averments to support the defense.<sup>4</sup> Thus, to a bill for discovery and execu-

<sup>1</sup> 6 Ves. jr. 818; *Milnes v. Gery*, 14 Ves. 400.

<sup>2</sup> 29 Car. II, c. 3.

<sup>3</sup> *Gilb. For. Rom.* 61; *Bawdes v. Amhurst*, Prec. in Chan. 402; *O'Reilly v. Thompson*, 2 Cox, 271; *Gunter v. Halsey*, Ambl. 586; *Jordan v. Sawkins*, 3 Bro. C. C. 388; s. c. 1 Ves. jr. 402; *Main v. Melbourn*, 4 Ves. 720. As to the equitable grounds upon which a case may be exempted from the operation of the statute of frauds, see 3 Ves. 38, note *a*.

<sup>4</sup> *Stewart v. Careless*, cited 2 Bro.

C. C. 565; *Dick*, 42; *Moore v. Edwards*, 4 Ves. 23; *Bowers v. Cator*, 4 Ves. 91; 2 Ves. & B. 364. And where there are not equitable circumstances stated in the bill, which might operate to prevent the relief sought by the plaintiff being barred by the statute, but the agreement is alleged to have been in writing, and facts are charged in evidence thereof, negative averments are also requisite to the defense. *Evans v. Harris*, 1 Ves. & B. 361; and see *Jones v. Davis*, 16 Ves. 262.

tion of a trust, the statute, with an averment that there was no declaration of trust in writing, may be pleaded,<sup>1</sup> though in the case cited the plea was overruled by an answer, admitting, in effect, the trust. To a bill for a specific performance of agreements, the same statute, with an averment that there was no agreement in writing signed by the parties, has been also pleaded.<sup>2</sup> It has been understood that this plea extended to the discovery of a parol agreement, as well as to the performance of it, except where the agreement had been so far performed that it might be deemed a fraud on the party seeking the benefit of it, unless it was completely carried into execution,<sup>3</sup> and cases have been determined accordingly.<sup>4</sup> This has of late been the subject of much discussion, and some contrariety of decision. In one case<sup>5</sup> the court appeared to have conceived that the courts of equity in determining cases arising upon this statute had laid down two propositions founded on rules of equity, and had given a construction to the act accordingly, which amounted to this, that the act was to be construed as if there had been an express exception to the extent of those rules in favor of courts of equity; and that no action was to be sustained except upon an agreement in writing, signed according to the requisition of the statute, and except upon bills in equity, where the party to be charged confessed the agreement by answer, or there

<sup>1</sup> *Cottington v. Fletcher*, 2 Atk. 156.

<sup>2</sup> *Mussell v. Cooke*, Prec. in Chan. 533; *Child v. Godolphin*, cited 2 Bro. C. C. 566; s. c. *Dick*, 39; *Child v. Comber*, 3 Swanst. 423, n.; *Hawkins v. Holmes*, 1 P. Wms. 770; *Clerk v. Wright*, 1 Atk. 12.

<sup>3</sup> That this is the construction put upon acts of part performance, see 1 Sch. & Lefr. 41; 3 Meriv. 246; *Morphett*

*v. Jones*, 1 Swanst. 172, and the authorities therein referred to.

<sup>4</sup> *Hollis v. Whiteing*, 1 Vern. 151; *Whaley v. Bagnal*, 1 Bro. P. C. 345, Toml. ed.; and see *Whitbread v. Brockhurst*, 1 Bro. C. C. 404; s. c. 2 Ves. & B. 153, n.; *Whitchurch v. Bevis*, 2 Bro. C. C. 559.

<sup>5</sup> *Whitchurch v. Bevis*, in Chan. 8th Feb. 1786, reported 2 Bro. C. C. 559.



was a part performance of the agreement. It was therefore determined that to the fact of the agreement the defendant must answer. But the court, afterwards, upon a rehearing, allowed the plea.<sup>1</sup> In subsequent cases this subject was much discussed, and the question was particularly considered, whether, if the defendant admitted by answer the fact of a parol agreement, but insisted on the protection of the statute, a decree could be pronounced for performance of the agreement without any other ground than the fact of the parol agreement thus confessed. At length it seems to have been decided, that though a parol agreement be confessed by the defendant's answer, yet if he insists on the protection of the statute no decree can be made merely on the ground of that confession;<sup>2</sup> and it may now, apparently, be concluded that a plea of the statute cannot in any case be a bar to a discovery of the fact of an agreement; and that, as the benefit of the statute may be had if insisted on by answer, there can be no use in pleading it in bar of relief. Whether the same rule would be applied to a confession of a trust by an answer, which may be considered as a declaration of the trust in writing, signed by the party, as indeed the confession of a parol agreement by answer might also be deemed, seems to be an important question, not agitated in the cases decided with respect to other agreements, and upon which it may be very difficult to make a satisfactory distinction. In the cases in which it was formerly considered that a plea of this statute was the proper defense, it was conceived that any matter charged by the bill which

<sup>1</sup> *Whitchurch v. Bevis*, on rehearing, Hil. vac. 1789, principally on the authority of *Whaley v. Bagnal*, 1 Bro. P. C. 345, Toml. ed.

<sup>2</sup> 1 Bro. C. C. 416; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; 4 Ves. jr. 23, 24; 6 Ves. 37; 12 Ves. 471; 15 Ves. 375.

might avoid the bar created by the statute must be denied, generally, by way of averment in the plea, and particularly and precisely by way of answer to support the plea. But according to one case,<sup>1</sup> if any such matter were charged in the bill, it became impossible to plead the statute in bar; the court having determined that denial of the matter so charged made the plea double,<sup>2</sup> and therefore informal; and it may now be doubtful whether a plea of the statute ought in any case (except perhaps the case of a trust) to extend to any discovery sought by the bill, and indeed whether it ought not to be deemed a needless and vexatious proceeding if confined to relief.<sup>3</sup>

The statute for limitation of actions<sup>4</sup> is likewise a good plea.<sup>5</sup> But if the bill charges a fraud, and that the fraud was not discovered<sup>6</sup> till within six years before filing the bill, the statute is not a good plea, unless the defendant denies the fraud,<sup>7</sup> or avers that the fraud, if any, was not discovered within six years before filing the bill.<sup>8</sup> And though the statute of

<sup>1</sup> *Whitbread v. Brockhurst*, 1 Bro. C. C. 404; s. c. 2 Ves. & B. 153, note.

<sup>2</sup> On the subject of double pleas, see hereafter, pp. 381-384.

<sup>3</sup> As to the effect of insisting on the statute by answer, or by plea, and whether necessary, see *Newton v. Preston*, Prec. in Chan. 103. See also *Kirk and Webb*, Prec. in Chan. 84. And see *Rowe v. Teed*, 15 Ves. 372; 18 Ves. 182; *Morphett v. Jones*, 1 Swanst. 172.

<sup>4</sup> 21 Jac. I, c. 16.

<sup>5</sup> *Gilb. For. Rom.* 61; *Wych v. East India Comp.* 3 P. Wms. 309; *Lacon v.*

*Lacon*, 2 Atk. 395; *Earl of Strafford v. Blakeway*, 6 Bro. P. C. 630, Toml. ed.; *Barber v. Barber*, 18 Ves. 286, and the cases therein cited.

<sup>6</sup> See 2 Sch. & Lefr. 631 and 633, and following pages, and the cases therein cited; and 2 Ball & B. 118.

<sup>7</sup> *Bicknell v. Gough*, 3 Atk. 558.

<sup>8</sup> *South Sea Comp. v. Wymondsell*, 3 P. Wms. 143; *Sutton v. Earl of Scarborough*, 9 Ves. 71. But according to *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, and 2 Ves. & Bea. 153, n., this should be considered a double plea.

\* A new statute of limitations (3 & 4 W. IV, c. 27) has been passed; but it only applies to real property and to money charged upon or payable out of real estate, and to legacies. This statute expressly extends to suits in equity. (See sect. 24.) It has been amended by stat. 7 Will. IV and 1 Vict. c. 28.

The statute of limitations may be pleaded in bar to a bill to prevent the setting up of an outstanding term. (*Jermey v. Best*, 1 Sim. 373.)

limitations is a bar to the claim of a debt, it was formerly determined not to be a bar to a discovery when the debt became due ; for if that had been set forth, it would appear to the court whether the time limited by the statute was elapsed,<sup>1</sup> but later decisions have been to the contrary.<sup>2</sup> These decisions are stated to have been founded on a rule adopted of late years, that where a demurrer to relief would be good, the same ground of demurrer would extend to the discovery on which the relief prayed was founded ; and applying this rule, originally confined to demurrers, to pleas also.<sup>3</sup> It may be doubted whether, in this extension of the rule to pleas, the difference between a plea and demurrer has been sufficiently considered. A demurrer founds itself on the bill, and asserts no matter of fact the truth of which can be disputed. A plea, on the contrary, asserts a fact the truth of which is put in issue by the plea. When therefore the statute of limitations is pleaded to a demand, and the question to be tried on the issue joined upon the plea is, whether the debt became due within six years before the filing of the bill, it is denying the plaintiff the benefit of that discovery in aid of proof which is allowed in all other cases, to hold that a plea of the statute of limitations, with an averment that the cause of action, if any, occurred six years before the filing of the bill will be a bar to a discovery of the truth of that averment.<sup>4</sup> In the case of money received by the defendant for the use of the plaintiff, and where the sums

<sup>1</sup> *Mackworth v. Clifton*, 2 Atk. 51 ; 2 Sch. & Lefr. 635.

<sup>2</sup> *Sutton v. Earl of Scarborough*, 9 Ves. jr. 71, and other authorities there cited. And see *Baillie v. Sibbald*, 15 Ves. 185 ; *Cork v. Wilcock*, 5 Madd. 328.

<sup>3</sup> See the distinction taken on the subject in *James v. Sadgrove*, 1 Sim. & Stu. 4.

<sup>4</sup> This argument is supported by *Cork v. Wilcock*, 5 Madd. 328 ; and 1 Sim. & Stu. 6.

received, as well as the times when they were respectively received, may rest in the knowledge of the defendant only, it may amount to a complete denial of justice to hold that a plea of the statute of limitations, with such an averment, is a bar to any discovery as to the sums received, and when received, and of whom, and as to entries in books and other papers, which discovery might enable the plaintiff to prove the falsehood of the plea by witnesses and production of papers as well as by the defendant's answer. Where a particular special promise is charged to avoid the operation of the statute,<sup>1</sup> the plaintiff must deny the promise charged by averment in the plea,<sup>2</sup> as well as by answer to support the plea.<sup>3</sup> Where the demand is of anything executory, as a note for payment of an annuity, or of money at a distant period, or by installments, the defendant must aver that the cause of action<sup>4</sup> hath not accrued within six years, because the statute bars only as to what was actually due six years before the action brought.<sup>5</sup> \* Upon a bill for discovery of a title, charging fraud, and praying possession, the statute of limitations alone is not a good plea to the discovery, so far as the charge of fraud extends, for the defendant must

<sup>1</sup> See *Andrews v. Brown*, Prec. in Chan. 385.

<sup>2</sup> *Anon.* 3 Atk. 70. But this, according to *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, would be a double plea.

<sup>3</sup> See on this subject, *Bayley v. Adams*, 6 Ves. 586; 5 Madd. 330; and 1 Sim. & Stu. 6.

<sup>4</sup> 2 Strange, 1291.

<sup>5</sup> 3 Atk. 71. See above, p. 356, note 8. And see the case of *Hony v. Hony*, 1 Sim. & Stu. 568, in which the fact of an intermediate acknowledgment of the plaintiff's right having been made, defeated the plea.

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\* Where a suit for an account of rents and profits has abated before decree by the death of the plaintiff, and a bill of revivor is not filed till a lapse of more than six years from the time of the abatement, a plea of the statute of limitations (1 Jac. I, c. 16) will be overruled, if it does not state that six years have elapsed since representation was taken out to the plaintiff. (*Perry v. Jenkins*, 1 My. & Cr. 118.)

answer to the charge of fraud,<sup>1</sup> and the plea must put the fraud in issue. The statute of limitations may be pleaded to a bill to redeem a mortgage<sup>2</sup> \* if the mortgagee has been in possession twenty years;<sup>3</sup> and indeed a demurrer has been allowed in this case<sup>4</sup> where the possession has appeared upon the face of the bill,<sup>5</sup> though some cases seem to be the contrary.<sup>6</sup> To a bill, on an equitable title to presentation to a living, seeking to compel the defendant to resign, plenarty for six months before the bill was filed may be pleaded in bar, the statute of Westminster the second,<sup>7</sup> being considered for this purpose as a statute of limitation, in bar of an equitable as well as of a legal right.<sup>8</sup> But if a *quare impedit* is brought before the six months are expired, though the bill is filed after, it may be in some cases a ground for the court to interfere,<sup>9</sup> and consequently plenarty would not in such cases be pleadable in bar. The statute of limitations may also be pleaded to a bill of revivor, if the proper representative does not proceed within six years after abatement of a suit,

<sup>1</sup> Bicknell v. Gough, 3 Atk. 558; 2 Sch. & Lefr. 635.

<sup>2</sup> On the question whether the statute itself applies to a case of this kind, or whether the rule that twenty years' possession by the mortgagee, subject to the usual exceptions of infancy, &c., without his doing any act which is to be regarded as an acknowledgment that the relation of debtor and creditor still subsists, has been adopted in courts of equity, in conformity with the provisions of the statute, see 1 Cox, 149; 2 Sch. & Lefr. 630, 632; 1 Ball & B. 167; 17 Ves. 97, 99; 19 Ves. 184; 2 Jac. & W. 145, 187; and see Blewit v. Thomas, 2 Ves. jr. 669.

<sup>3</sup> Aggas v. Pickerell, 3 Atk. 225; 2 Ves. jr. 280.

<sup>4</sup> 3 P. Wms. 287, note. See also 1 Vern. 418, and Beckford v. Tobin, ab. p. 213, n.; 2 Sch. & Lefr. 638. And see Hodle v. Healey, 1 Ves. & Bea. 536, and the cases therein cited.

<sup>5</sup> Edsell v. Buchanan, 4 Bro. C. C. 254.

<sup>6</sup> 3 Atk. 225, 226, and the authorities there cited.

<sup>7</sup> 13 Edw. I. c. 5.

<sup>8</sup> Gardiner v. Griffith, 2 P. Wms. 404; 3 Atk. 459; Boteler v. Allington, 3 Atk. 453. And see Mutter v. Chanvell, 1 Meriv. 475.

<sup>9</sup> 2 P. Wms. 405.

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\* As a foreclosure suit is in substance a suit for the recovery of the money secured by the mortgage, the statute of limitations (27 Will. IV, c. 27, s. 40) may be pleaded to the bill. (Dearman v. Wyche, 9 Sim. 570.)

provided there has been no decree,<sup>1</sup> \* for a decree being in the nature of a judgment the statute of limitations cannot be applied to it.<sup>2</sup> But where the consequence of reviving proceedings to carry a decree into execution would have been to call on representatives to account for assets after a great length of time, and under peculiar circumstances of laches, a bill of revivor and supplement for those purposes was dismissed.<sup>3</sup> Although suits in equity are not within the words of the statute, the courts of equity generally adopt it as a positive rule, and apply it by parity of reason to cases not within it.<sup>4</sup>† In general they also

<sup>1</sup> Hollingshead's Case, 1 P. Wms. 742; Comber's Case, 1 P. Wms. 766; 2 Sch. & Lefr. 633; 1 Ball & B. 531.

<sup>3</sup> Hercy v. Dinwoody, 4 Bro. C. C. 257.

<sup>2</sup> 1 P. Wms. 744; 2 Sch. & Lefr. 633.

<sup>4</sup> Lord Mansf. 2 Burr. 961; 2 Atk. 611; 3 Bro. C. C. 340, note; 1 Sch. & Lefr. 428.

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\* See note \*, p. 358.

† See Baldwin v. Peach, 1 Y. & C. Eq. Ex. 453, and note \* to p. 358.

A plea that the title of the plaintiff, or of the person through whom he claims, accrued at a particular time, and that the possession of the property and the receipts of the rents and profits thereof have been averse to him and the person through whom he claims ever since that time, will be overruled, if it does not set forth the circumstances constituting such adverse possession; because adverse possession may consist in various things; and if none of these are specified, the plaintiff may have no precise knowledge of the defense which he is to meet. And if a defendant puts in a plea of adverse possession, and the bill specifically charges that the defendant has documents in his possession which prove certain facts, and such facts, if proved, would tend to negative such adverse possession, the defendant must deny the possession of those documents; and if the bill contains any other statement or charge tending to negative the plea of adverse possession, such statement or charge must be denied. (*Hardman v. Ellames*, 2 My. & K. 732.)

But a plea of the statute of limitations need not negative the usual *general* allegation that the defendant has in his custody documents relating to the matters contained in the bill. (*Forbes v. Skelton*, 8 Sim. 325.)

Where a bill contains an allegation of matter which would remove the legal bar of the statute of limitations, if the defendant pleads the legal bar, without fully negating that allegation by an answer, the plea will be overruled. (*Foley v. Hill*, 3 My. & Cr. 475.)

hold that unless the defendant claims the benefit of the statute by plea or answer, he cannot insist upon it in bar of the plaintiff's demand;<sup>1</sup> but notwithstanding, the courts will, in cases which will allow of the exercise of discretion, use the statute as a rule to guide that discretion;<sup>2</sup> and will also sometimes resort to the policy of the ancient law, which in many cases limited the demand of accruing profits to the commencement of the suit.<sup>3</sup>

Any other public statute which may be a bar to the demands of the plaintiff may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute.<sup>4</sup>

A particular statute may also be pleaded in the same manner. Thus, to a bill impeaching a sale of lands in the fens by the conservators under the statutes for draining the fens, the defendant pleaded the statutes, and that the sale was made by virtue of and according to those statutes, and the plea was allowed.<sup>5</sup>

X. Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defense in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to

<sup>1</sup> 1 Atk. 494.

<sup>2</sup> 1 Atk. 494. Courts of equity, it seems, in respect of legal titles and demands, are bound by the statute (2 Sch. & Lefr. 630, 631; and see *Hony v. Hony*, 1 Sim. & Stu. 568); but, in respect of equitable titles and demands, are only influenced in their determination by analogy to it. 1 Sch. & Lefr. 428; 2 Sch. & Lefr. 632; 10 Ves. 466; 15 Ves. 496; 17 Ves. 97; 1 Ball & B. 119, 166; 2 Jac. & W. 163, and following pages, particularly p. 175; and 2 Jac. & W. 192.

<sup>3</sup> On this subject see *Pulteney v. Warren*, 6 Ves. 73; *Pettward v. Prescott*, 7 Ves. 541.

<sup>4</sup> See instances of a plea of the statute of maintenance, 32 Hen. VIII, c. 9, s. 3, *Hitchins v. Lander*, Coop. 34; *Wall v. Stubbs*, 2 Ves. & Bea. 354; and another example of the proposition in the text, *Ocklestone v. Benson*, 2 Sim. & Stu. 265. And see *De Tastet v. Sharpe*, 3 Madd. 51.

<sup>5</sup> *Brown v. Hamond*, 2 Chan. Cas. 249.

defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side.<sup>1</sup> This is particularly the case where the defendant claims under a purchase or mortgage for valuable consideration without notice of the plaintiff's title, which he may plead in bar of the suit.<sup>2\*</sup> Such a plea must aver that the person who conveyed or mortgaged to the defendant was seized in fee, or pretended to be seized,<sup>3†</sup> and was in possession,<sup>4</sup> if the conveyance purported an immediate transfer of the possession at the time when he executed the purchase or mortgage deed.<sup>5</sup> It must aver a convey-

<sup>1</sup> See 2 Ves. jr. 457, 458, and the authorities there referred to; and see the case of *Gait v. Osbaldeston*, 5 Madd. 428; s. c. 1 Russ. 158. One exception has however been made in favor of a dowress, see *Williams v. Lambe*, 3 Bro. C. C. 264.

<sup>2</sup> *Fitzgerald v. Burk*, 2 Atk. 397; *Story v. Lord Windsor*, 2 Atk. 630; *Bullock v. Sadler*, Ambl. 763; *Strode v. Blackbourne*, 3 Ves. 222; *Wallwyn*

*v. Lee*, 9 Ves. 24; 1 Ball & B. 171; 2 Ball & B. 303.

<sup>3</sup> 3 P. Wms. 281; *Story v. Lord Windsor*, 2 Atk. 630; 17 Ves. 250.

<sup>4</sup> *Trevanian v. Mosse*, 1 Vern. 246; 3 Ves. 226; 9 Ves. 32; 16 Ves. 252.

<sup>5</sup> 3 P. Wms. 281. As to the case where the purchase is of a reversion, see *Hughes v. Garth*, Ambl. 421; s. c. 2 Eden, 168.

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\* The consideration of marriage will support a plea of purchase for valuable consideration, without notice, equally with a price paid in money. (*Jackson v. Rowe*, 2 Sim. & Stu. 472.)

A plea of a purchase for valuable consideration, without notice, is no protection against an adverse title which would have become known to the purchaser, if he had used reasonable diligence in the investigation of the title. (Ib.)

† A plea of a purchase for valuable consideration without notice must show that if the vendor or settlor had not a good title, the party purchasing was imposed on at the time of his purchase. And hence, if a plea of this kind is put in by the heir at law of one who became a purchaser of his wife's estate for a valuable consideration or under a prenuptial settlement, the plea must aver that the wife was seized, or pretended to be seized, not only *before*, but *at* the respective times of the execution of the marriage settlement and of the marriage. (*Jackson v. Rowe*, 4 Russ. 514.)

In this case, however, where the words "and at" were omitted after the word "before," by a mere slip, Lord Lyndhurst, C., allowed the plea to be amended by inserting them, subject to the making of an affidavit of that fact if required by the plaintiff.



ance, and not articles merely ;<sup>1</sup> for if there are articles only, and the defendant is injured, he may sue at law upon the covenants in the articles.<sup>2</sup> It must aver the consideration<sup>3</sup> and actual payment of it ; a consideration secured to be paid is not sufficient.<sup>4</sup> The plea must also deny notice<sup>5</sup> of the plaintiff's title or claim,<sup>6</sup> previous to the execution of the deeds and payment of the consideration ;<sup>7</sup> and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title.<sup>8</sup> If particular instances of notice, or circumstances of fraud are charged, they must be denied as specially and particularly as charged in the bill.<sup>9</sup> The special and particular denial of notice or fraud must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency ;<sup>10</sup> but notice and fraud must also be denied generally by way of averment in the plea, otherwise the fact of notice or of fraud will not be in issue.<sup>11</sup> Notice or fraud thus put

<sup>1</sup> *Fitzgerald v. Lord Falconbridge*, Fitzg. 207 ; 1 Atk. 571 ; 3 Atk. 377.

<sup>2</sup> 1 Atk. 571.

<sup>3</sup> 1 Cas. in Chan. 34 ; *Millard's Case*, 2 Freem. 43 ; *Brereton v. Gamul*, 2 Atk. 240.

<sup>4</sup> *Hardingham v. Nicholls*, 3 Atk. 304 ; *Maitland v. Wilson*, 3 Atk. 814.

<sup>5</sup> On the subject of notice, actual and constructive, see *Sugden Vend. & Purch.* 6th ed. 710.

<sup>6</sup> *Lady Bodmin v. Vandebendy*, 1 Vern. 179 ; *Jones v. Thomas*, 3 P. Wms. 243 ; *Kelsall v. Bennet*, 1 Atk. 522.

<sup>7</sup> *More v. Mayhow*, 1 Cas. in Chan. 34 ; s. c. 2 Freem. 175 ; 1 Eq. Cas. Abr. 38, 334 ; *Tourville v. Naish*, 3 P. Wms. 307 ; 1 Atk. 384 ; 2 Atk. 631 ; 3 Atk. 304.

<sup>8</sup> 1 Atk. 522. And it must not appear that the defendant, though he should claim as purchaser under a settlement executed at the time of his marriage, might have had notice of the plaintiff's title by using due diligence

in the investigation of his own. *Jackson v. Rowe*, 2 Sim. & Stu. 472 ; and see *Hamilton v. Royse*, 2 Sch. & Lefr. 315 ; 13 Ves. 120 ; 14 Ves. 433 ; 6 Dow. P. C. 223, 224 ; 6 Madd. 59.

<sup>9</sup> *Radford v. Wilson*, 3 Atk. 815 ; 2 Ves. 450 ; *Jarrard v. Saunders*, 2 Ves. jr. 137 ; s. c. 4 Bro. C. C. 322.

<sup>10</sup> *Anon.* 2 Cas. in Chan. 161 ; *Price v. Price*, 1 Vern. 125 ; 6 Ves. 596 ; 14 Ves. 66. It has been lately declared that it is not the office of the plea to deny particular facts of notice ; but that it is sufficient, where such facts are alleged, to make a general denial which will include constructive as well as actual notice ; yet that if circumstances be specially charged as evidence of notice, they must be denied by averments in the plea, and by an answer accompanying the same. *Pennington v. Beechey*, 2 Sim. & Stu. 282.

<sup>11</sup> *Harris v. Ingledew*, 3 P. Wms. 94 ; 3 P. Wms. 244, note ; *Gilb. For. Rom.* 58 ; *Treat. of Frauds*, c. 18, p. 220. In

in issue, if proved, will effectually open the plea on the hearing of the cause.

A purchaser with notice, of a purchaser without notice, may shelter himself under the first purchaser.<sup>1</sup> But notice to an agent is notice to the principal;<sup>2</sup> and where a person having notice purchased in the name of another who had no notice, and knew nothing of the purchase, but afterwards approved it, and without notice paid the purchase money, and procured a conveyance, the person first contracting was considered from the beginning as the agent of the actual pur-

the case of *Meadows v. Duch*, of Kingston, Mich. 1777 (s. c. reported Ambl. 756), the chancellor seemed to be of opinion that notice and fraud were to be denied by way of averment in the plea in cases only where the denial made part of an equitable defense; as in a plea of purchase for valuable consideration, the denial of notice must be by way of averment in the plea, because the want of notice creates the equitable bar. But in *Devie and Chester*, in Chan. March 10th, 1780, a decree establishing a modus having been pleaded to a bill for tithes, in which the plaintiff stated that the defendants set up the decree as a bar to his claim, and to avoid the effect of the decree, charged that it had been obtained by collusion, and stated facts tending to show collusion, the chancellor was of opinion that the defendants, not having by averments in the plea, denied the collusion, although they had done so by answer in support of the plea, the plea was bad in form, and he overruled it accordingly. And in *Hoare and Parker*, in Chan. 17th and 19th of Jan. 1785 (reported 1 Bro. C. C. 578; s. c. 1 Cox, 244), the plaintiffs having brought their bill as trustees, claiming quantities of plate described in a schedule annexed to the bill, of which the use had been given by the will of Admiral Stewart to his widow for her life, and after her death to his son and his issue, against the defendant, a pawnbroker, with whom the plate, or part of it, was alleged to have been pledged by the widow; and the

bill having sought a discovery of the particular pieces of plate pawned, in order to found an action of trover, the defendant pleaded to so much of the bill as sought a discovery of the plate pawned, as after mentioned in the plea, and of the plate specified in the schedule annexed to the bill, that Mrs. Stewart had pledged divers articles of plate at several times stated in the plea, for sums of money specified in the plea, which sums the defendant averred were paid to Mrs. Stewart; and he also averred that he had no notice of the will of Admiral Stewart till after the death of Mrs. Stewart; but he did not aver by his plea that he had no plate pawned with him by Mrs. Stewart besides the pieces pawned at the particular times mentioned in the plea, although he did by his answer deny that he had any other. The chancellor was of opinion that the plea was therefore defective in point of form, as it extended to all the plate mentioned in the schedule of which a discovery was sought by the bill. See 6 Ves. 595, 597; and see pp. 331 *et seq.*

<sup>1</sup> *Brandlyn v. Ord*, 1 Atk. 571; *Lowther v. Carlton*, 2 Atk. 139; s. c. 2 Atk. 242; Cas. t. Talb. 187; 2 Eq. Cas. Abr. 685; *Sweet v. Southcote*, 2 Bro. C. C. 66; Ambl. 313; 11 Ves. 478; 13 Ves. 120; and see *Harrison v. Forth*, Prec. in Chan. 51.

<sup>2</sup> *Brotherton v. Hatt*, 2 Vern. 574; *Le Neve v. Le Neve*, 3 Atk. 646; 1 Ves. 62; 2 Ves. 62, 370; 13 Ves. 120; *Mountford v. Scott*, 3 Madd. 34.

chaser, who was therefore held affected with notice.<sup>1</sup> A settlement in consideration of marriage is equivalent to a purchase for a valuable consideration,<sup>2</sup> and may be pleaded in the same manner.<sup>3</sup> If a settlement is made after marriage in pursuance of an agreement before marriage, the agreement as well as the settlement must be shown.<sup>4</sup> A widow, defendant to a suit brought by any person claiming under her husband, to discover her title to lands of which she is in possession as her jointure, may plead her settlement in bar to any discovery, unless the plaintiff offers, and is able, to confirm her jointure. But a plea of this nature must set forth the settlement, and the lands comprised in it, with sufficient certainty.<sup>5</sup> A plea of purchase for a valuable consideration protects a defendant from giving any answer to a title set up by the plaintiff, but a plea of bare title only, without setting forth any consideration, is not sufficient for that purpose.<sup>6</sup> Upon a plea of purchase for a valuable consideration to a discovery of deeds and writings, the purchase deed must be excepted, for it is pleaded.<sup>7</sup>

A plea of purchase for a valuable consideration, without notice of the plaintiff's title, to a bill to perpetuate the testimony of witnesses, has been allowed, though there are few cases in which the court will not give that assistance to the furtherance of justice. Thus, to a bill to perpetuate the testimony of witnesses to a will, the defendant pleaded purchase for a valuable

<sup>1</sup> *Jennings v. Moore*, 2 Vern. 609; s. c. on appeal under title *Blenkarne v. Jennens*, 2 Bro. C. C. 278, Toml. ed.; *Coote v. Mammon*, 5 Bro. P. C. 355, Toml. ed.

<sup>2</sup> 1 Atk. 190; 6 Ves. 659; 18 Ves. 92; 6 Dow. P. C. 209; 2 Sim. & Stu. 475.

<sup>3</sup> *Harding v. Hardrett*, Finch, 9.

<sup>4</sup> *Lord Keeper v. Wyld*, 1 Vern. 139.

<sup>5</sup> *Petre v. Petre*, 3 Atk. 511; 3 Atk. 571; 2 Ves. 450; *Leech v. Trollop*, 2 Ves. 662. As to the case of a dowress plaintiff, see above, p. 362, note 1. 1 Ves. jr. 76.

<sup>6</sup> 2 Atk. 241.

<sup>7</sup> 2 Ves. 107.

consideration, without notice of the will, and the plea was allowed.<sup>1</sup> But in this case, as reported, there appears to have been nothing to impede the plaintiff's proceeding at law to assert his title under the will, against the defendant's possession, and there was apparently, therefore, no equity to support the bill.<sup>2</sup>

XI. Though a plaintiff may be fully entitled to the relief he prays, and the defendant may have no claim to the protection of the court which ought to prevent its interference, yet the defendant may object to the bill if it is deficient to answer the purposes of complete justice. This is usually for want of proper parties; and if the defect is not apparent on the face of the bill,<sup>3</sup> the defendant may plead the matter necessary to show it.<sup>4</sup> \* A plea of want of parties goes both to

<sup>1</sup> *Bechinall v. Arnold*, 1 Vern. 354.

<sup>4</sup> *Hanne v. Stevens*, 1 Vern. 110;

<sup>2</sup> See also *Ross v. Close*, 5 Bro. P. C. 362, Toml. ed.; 2 Ves. jr. 458. *Ashurst v. Eyre*, 2 Atk. 51; s. c. 3 Atk. 341.

<sup>3</sup> 16 Ves. 325.

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\* Where a plea is put in for want of parties, on the ground that certain persons not named parties claimed adversely, such persons alleging certain facts as the ground of their claim; and the plea does not state that those facts are true, but, by admitting the statements in the bill, admits indeed that those facts are falsely alleged, it cannot be sustained. (*Birch v. Gough*, 3 Jur. 769, V. C. E.)

Where a bill is filed in respect of a legacy given to a class of children, to vest at twenty-one or marriage, a plea that the representative of a deceased child is a necessary party, will be overruled, if it does not show that such child had attained a vested interest. (*Overton v. Banister*, 4 Beav. 205.)

A plea that an equitable mortgagee by deposit of title deeds is not a party, will be overruled, if it does not state with whom they were deposited, but only leads to an inference that they were deposited with a certain person; for if this person were made a party, the defendant might again object that some other person in whose hands the deeds then were, is a necessary party. (*Henley v. Stone*, 4 Beav. 389.)

A second plea for want of parties is allowable, where by an amendment of the bill subsequent to the first plea, the plaintiff brings forward additional matter which shows that the persons mentioned in the second plea

discovery and relief where relief is prayed,<sup>1</sup> though the want of parties is no objection to a bill for a discovery merely.<sup>2</sup> Where a sufficient reason to excuse the defect is suggested by the bill, as where a personal representative is a necessary party, and the bill states that the representation is in contest in the ecclesiastical court,<sup>3</sup> or where the party is resident out of the jurisdiction of the court,<sup>4</sup> and the bill charges that fact, or where a bill seeks a discovery of the necessary parties,<sup>5</sup> an objection for want of parties will not be allowed, unless, perhaps, the defendant should controvert the excuse made by the bill by pleading matter to show it false. Thus, in the first instance, if before the filing of the bill the contest in the ecclesiastical court was determined, and administration granted, and the defendant showed this by plea, perhaps the objection for want of parties would be in strictness good. Upon arguing a plea of this kind, the court, instead of allowing it, has given the plaintiff leave to amend the bill upon payment of costs;<sup>6</sup> a liberty which he may also obtain after allowance of a plea, according to the common course of the court; for the suit is not determined by

<sup>1</sup> 2 Atk. 51, in *Plunket v. Penson*, wherein this plea is termed a plea in bar; but see 6 Ves. 594; 16 Ves. 325.

<sup>2</sup> *Sangosa v. E. I. Comp.* 2 Eq. Cas. Abr. 170.

<sup>3</sup> See 2 Atk. 51, in *Plunket v. Penson*.

<sup>4</sup> *Cowslad v. Cely*, Prec. in Chan. 83; and see *Haddock v. Thomlinson*, 2 Sim. & Stu. 219, and above, p. 257, note 1.

<sup>5</sup> See *Bowyer v. Covert*, 1 Vern. 95.

<sup>6</sup> *Stafford v. City of London*, 1 P. Wms. 428; and where the plea was defective in point of form, in not stating that additional parties were necessary, and naming them, leave was given to amend the plea. *Merrewether v. Mellish*, 13 Ves. 435. See 11 Ves. 369; 16 Ves. 325.

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are necessary parties, in addition to those mentioned in the first plea. (*Henley v. Stone*, 4 Beav. 389.)

Where a bill seeks a discovery whether there are any incumbrancers, and who they are, the very nature of the bill precludes the defendant from pleading to the bill, on account of those incumbrancers not being made parties. (*Rawlins v. Dalton*, 3 Y. & C. Eq. Ex. 447.)

allowance of a plea as it is by allowance of a demurrer to the whole of a bill.<sup>1</sup>

Having thus considered all the objections to a bill which have occurred, as extending to relief, and which likewise extend to discovery\* wherever it is merely sought for the purpose of obtaining relief, and can have no other end, it remains to treat of such objections, as are grounds of plea to discovery only. These are nearly the same as those which have been already mentioned as causes of demurrer to discovery. They may be, I. That the plaintiff's case is not such as entitles a court of equity to assume a jurisdiction to compel a discovery in his favor; II. That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery; III. That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him, even for the purpose of discovery only; IV. That the situation of the defendant renders it improper for a court of equity to compel a discovery.†

<sup>1</sup> See below, p. 391.

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\* Where a bill alleges the plaintiff's title to an estate, and prays an account of the rents and a discovery of documents, and the defendant pleads, in bar to the relief, that he is the party entitled, and pleads to so much of the discovery as requires an account of the rents and a discovery of documents relating to the rents, and in his answer sets forth a list of all documents except such as relate exclusively to the rents, his plea will be overruled: for such documents may contain information which may go to prove the plaintiff's title. (*Rigby v. Rigby*, 10 Jur. 126, V. C. E.)

† The statute of limitations may be pleaded to a bill of discovery in aid of an action of assumpsit, provided it has been pleaded to the action, (*Macgregor v. East India Company*, 2 Sim. 452.)

And such a plea need not deny the usual allegation as to books and papers in the possession or power of the defendant, from which the truth of the matters in the bill would appear, unless there is an allegation or

I. If the plaintiff's case is not such as entitles a court of equity to assume a jurisdiction to compel a discovery in his favor, though he falsely states a different case by his bill, so that it is not liable to a demurrer, the defendant may by plea state the matter necessary to show the truth to the court.<sup>1</sup>

II. If a plaintiff by his bill states himself to have an interest which entitles him to call on the defendant for a discovery, though in truth he has no such interest, the defendant may by plea protect himself from making the discovery, which may involve him in difficulty and expense, and perhaps may be prejudicial to him in other cases.\* Thus, if a plaintiff states himself to be

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<sup>1</sup> But if a plaintiff who is bankrupt, in a bill filed by him to obtain discovery in aid of his defense to an action, and for an account, and an injunction in the mean time, should avoid stating his bankruptcy, although this court, it seems, would not afford him relief by decreeing the payment of the balance to him, it would overrule a plea of that fact so far as to give him the discovery, and even to have the accounts taken. *Lowndes v. Taylor*, 1 Madd. 423; S. C. 2 Rose, 365. See above, p. 165 note 2.

charge that there has been a promise or acknowledgment evidenced by a writing within six years. (Ib.)

The statute of limitations may also be pleaded to a bill of discovery in aid of an action of ejectment. (*Scott v. Broadwood*, 2 Coll. 447.)

Where a bill of discovery is filed in aid of a plea to an action for libel, pending a demurrer at law to that plea, and the defendant in equity puts in a plea to the bill, stating the pendency of such demurrer at law, and averring the invalidity of such plea at law; the plea to the bill will be allowed, notwithstanding the possibility that the court of law may allow the plea at law to be amended; for, in such case, there is no actual proceeding at law in which the discovery, if obtained, can be used. (*Stewart v. Lord Nugent*, 1 Keen, 201.)

A plea that an action for libel has been discontinued and is at an end, is no defense to a bill for a discovery and commission in aid of a plea of justification to the action, inasmuch as the defendant in equity might commence another action. But upon the defendant afterwards undertaking not to bring any other action, and to pay the costs of the suit, all further proceedings will be stayed. (*Wilmot v. Maccabe*, 4 Sim. 263.)

\* *Mendizabel v. Machado*, 1 Sim. 68.

The rule that officers of a corporation may be made codefendants with the corporation applies to a bill of discovery, as well as to a bill for

heir or administrator of a person dead intestate, and in that character seeks a discovery from a person in possession of property which did belong to the deceased, of his title thereto, or of the particulars of which it consists, the defendant may plead that another person is heir or personal representative, or that the person alleged to be dead is living.<sup>1</sup>

III. It has been already observed that if a claim of interest is alleged by a bill against a person who has no interest in the subject, he cannot by demurrer protect himself from a discovery, and must resort either to a plea or disclaimer;<sup>2</sup> by either of which means it should seem he may protect himself from making by answer that discovery which he may properly be required to make if called upon as a witness.<sup>3</sup> In some cases, however, the court has allowed a defendant to protect himself, by answer denying the charge of interest, from answering to matters to which he may be afterwards called upon to answer in the character of a witness; and perhaps, in justice to those against whom he may afterwards be called upon to give evidence as a witness, he ought not to be previously examined to the same matters upon a bill, under the pretense of an interest which he has not.

<sup>1</sup> Ord against Williamson, Trin. 1773; Ord v. Huddleston, Dick. 510. And see Gait v. Osbaldeston, 1 Russ. 158; s. c. 5 Madd. 428.

<sup>2</sup> Page 284. And see 1 Ves. 426.

<sup>3</sup> But it does not appear to be settled that a bankrupt could by plea protect himself from discovery. See 1 Ves. & Bea. 550.\*

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relief. (*Glascott v. The Governor and Company of the Copper Miners of England*, 11 Sim. 305.)

\* See *supra*, pp. 253, 254. But see *Griffin v. Archer*, 2 Anst. 478.

To a bill for the delivery up of bills of exchange which the plaintiff had been fraudulently induced by the drawer to accept without a consideration, the drawer cannot plead that he has become bankrupt since the filing of the bill. (*Mackworth v. Marshall*, 3 Sim. 368.)



IV. The situation of a defendant may render it improper for a court of equity to compel a discovery, 1, because the discovery may subject him to pains and penalties; 2, because it will subject him to a forfeiture, or something in the nature of a forfeiture; 3, because it would betray the confidence reposed in him as a counsel, attorney, or arbitrator; 4, because he is a purchaser for a valuable consideration without notice of the plaintiff's title.

1. It has been already observed, that no person is bound to answer so as to subject himself to punishment, in whatever manner that punishment arises, or whatever is the nature of the punishment.<sup>1</sup> If, therefore, a bill requires an answer which may subject the defendant to any pains and penalties,\* or tends to accuse him of any crime, and this is not so apparent upon the face of the bill that the defendant can demur, he may by plea set forth by what means he may be liable to punishment, and insist he is not bound to answer the bill, or so much thereof as the plea will cover.<sup>2</sup>

Thus to a bill brought for discovery of marriage, where the fact, if true, would have subjected the party

<sup>1</sup> Page 289. See 2 Ves. 245; 2 Swanst. 214, 216; Bird v. Hardwicke, 1 Vern. 109; 1 Vern. 109; 11 Ves. 525. <sup>2</sup> Bird v. Hardwicke, 1 Vern. 109; Claridge v. Hoare, 14 Ves. 59.

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\* If in the interval between the filing and the arguing of a plea that the discovery sought would expose the defendant to a penalty, the period elapses within which the penalty can be sued for, the plea will be overruled. (The Corporation of Trinity House Strond v. Burge, 7 Law J. [O. S.] 44, V. C.)

Where a tenant undertakes to pay an additional rent, in case he shall do or not do certain acts, though such additional rent be in some passages of the lease designated a penalty, it is not considered as a penalty so as to protect the tenant from answering to a bill of discovery as to such acts. (Jones v. Green, 3 Y. & J. 290.)

to punishment in the ecclesiastical court for incest, the defendant pleaded matter to show that the marriage, if real, was incestuous, and would subject the parties to pains and penalties.<sup>1</sup> And where a bill was brought against a woman claiming as widow of a person dead, alleging that before her marriage with the deceased she was married to another person, who was living at the time of her marriage with the deceased, the defendant pleaded that marriage to the discovery of the supposed first marriage, and insisted that she was not compellable to answer to the fact of the first marriage, as it would tend to show her guilty of bigamy.<sup>2</sup> So to a bill for a discovery whether the defendant had become a purchaser of an estate of which the supposed seller was not in possession, the defendant pleaded the statute against selling or contracting for any pretended rights or titles.<sup>3</sup> And to a bill brought by insurers for a discovery of what goods had been shipped on board a vessel, the defendant pleaded the statutes which made it penal to export wool. He was, however, directed to answer so far as to discover what goods were on board the vessel besides wool.<sup>4</sup> But where the discovery sought was not of a fact which could subject the defendant to any penalty, though connected with another fact which might, as, where the question was whether the defendant had a legitimate son, the defendant was compelled to answer. For the discovery of that fact would not subject him to a penalty, though the discovery of his marriage with the mother of the son might, and therefore he was not compelled to discover the marriage.<sup>5</sup>

<sup>1</sup> *Brownsword v. Edwards*, 2 Ves. 243; 14 Ves. 65.

<sup>2</sup> 5 Bro. P. C. 102, Toml. ed.

<sup>3</sup> *Sharp v. Carter*, 3 P. Wms. 375.

<sup>4</sup> *Duncalf v. Blake*, 1 Atk. 52.

<sup>5</sup> *Finch v. Finch*, 2 Ves. 491.

2. It has been also<sup>1</sup> observed, that no person is bound to answer so as to subject himself to any forfeiture, or to anything in the nature of a forfeiture.<sup>2</sup> If this is not apparent on the bill, the defense must be made by way of plea. Thus where a bill was brought to discover whether the defendant had assigned a lease, he pleaded to the discovery a proviso in the lease, making it void in case of assignment.<sup>3</sup> And to a bill seeking a discovery whether a person under whom the defendant claimed was a Papist, the defendant pleaded his title, and the statute of 11 & 12 Will. III disabling Papists.<sup>4</sup>\* But such a plea will only bar the discovery of the fact which would occasion a forfeiture. Therefore, where a tenant for life pleaded to a bill for discovery, whether he was tenant for life or not, that he had made a lease for the life of another, which, if he was tenant for his own life only, might occasion a forfeiture, the plea was overruled.<sup>5</sup> So upon a bill charging the defendant to be tenant for life, and that he had committed waste, it was determined that he might plead to the discovery of the act which would occasion the forfeiture, the waste, but that he could not plead to the discovery whether he was tenant for life or not.<sup>6</sup> Upon an information by the attorney general on behalf of the crown, to discover whether the defendant was an alien, and whether her child was an alien, and where born, it was held the defendant was bound to discover whether she was herself an

<sup>1</sup> Page 292.

<sup>2</sup> 1 Atk. 527. And see Parkhurst v. Lowten, 1 Meriv. 391.

<sup>3</sup> Fane v. Atlee, 1 Eq. Cas. Abr. 77.

<sup>4</sup> Smith v. Read, 1 Atk. 526; 3 Atk. 457; Jones v. Meredith, Com. R. 661;

s. c. Bunb. 346; Harrison v. Southcote, 528; s. c. 2 Ves. 389.

<sup>5</sup> Weaver v. Earl of Meath, 2 Ves. 108.

<sup>6</sup> 2 Ves. 109.

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\* The disabilities of Papists from holding property are removed by the stat. 10 Geo. IV, c. 7, s. 23.

alien, the legal disability of an alien not being a penalty or forfeiture; and that she was also bound to discover whether her child was an alien, and where born, as she had a chattel interest in the property in question in trust, eventually, for the crown, if her child was an alien.<sup>1</sup> In all cases of forfeiture, if the plaintiff is entitled alone to the benefit of the forfeiture,<sup>2</sup> and waives it by his bill, the defendant will be compelled to make the discovery required. And though the plaintiff is not entitled to the benefit of the forfeiture, yet if the defendant has by his own agreement bound himself not to insist on being protected from making the discovery, the court will compel him to make it.<sup>3</sup> In some cases the legislature has expressly provided that the parties to transactions made illegal by statute shall be compellable to answer bills in equity for discovery of such transactions; and in such cases a defendant cannot protect himself from making the discovery thus required by pleading the statute which may subject him to penalties in consequence of the discovery.<sup>4</sup>

3. If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him as counsel, attorney, or arbitrator, he may plead in bar of the discovery that his knowledge of the fact was so obtained.<sup>5</sup> \*

<sup>1</sup> Att. Gen. *v.* Duplessis, Parker, 144; S. C. 1 Bro. P. C. 415; Daubigny *v.* Davallon, Anstr. 462.

<sup>2</sup> South Sea Comp. *v.* Bumpstead, Mosely, 75; S. C. 1 Eq. Cas. Abr. 77.

<sup>3</sup> Mosely, 77; and the cases there cited; African Comp. *v.* Parish, 2 Vern. 244.

<sup>4</sup> Bancroft *v.* Wentworth, 3 Bro. C. C. 11. See, however, Bullock *v.* Richardson, 11 Ves. jr. 373; Billing *v.* Flight, 1 Madd. 230.

<sup>5</sup> Bulstrode *v.* Lechmore, 1 Cas. in Chan. 277; S. C. 2 Freem. 5; and see Legard *v.* Foot, Finch, 82; Sandford *v.* Remington, 2 Ves. jr. 189; Wright *v.*

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\* As to this subject, see the present editor's [Smith] note\* to p. 396 *infra*.

4. If a defendant is a purchaser for a valuable consideration, without notice of the plaintiff's title, a court of equity will not in general compel him to make any discovery which may affect his own title.<sup>1</sup> Thus if a bill is filed for discovery of goods purchased of a bankrupt, the defendant may plead that he purchased them *bona fide* for a valuable consideration, paid before the commission of bankrupt was sued out, and before he had any notice of the bankruptcy.<sup>2</sup>

Pleas have been hitherto considered with reference only to original bills, and of these a certiorari bill, from the nature of the proceedings upon it, will not in general admit of a plea.<sup>3</sup> But the same grounds of plea will hold in many cases to the several other kinds of bills according to their respective natures; and some of them, as already observed, admit of a peculiar defense which may be urged by way of plea.

Thus if a bill of revivor is brought without sufficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to show that the plaintiff is not entitled to revive the suit against him.<sup>4</sup> Or if the plaintiff is not entitled to revive the suit at all, though a title is stated in the bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by way of plea. Indeed it seems to have been thought that a defendant could only object to

Mayer, 6 Ves. 280; Richards v. Jackson, 18 Ves. 472; 1 Sch. & Lefr. 226; Lowten v. Parkhurst, 2 Swanst. 194; and Harvey v. Clayton, and other cases reported, 2 Swanst. 221, note.

<sup>1</sup> 2 Ves. jr. 458; and see above, pp. 361 *et seq.*; 3 Atk. 302.

<sup>2</sup> Perrat v. Ballard, 2 Cas. in Chan. 72; Heyman v. Gomeldon, Finch, 34; Abery v. Williams, 1 Vern. 27.

<sup>3</sup> See, however, Cook v. Delebere, 3

Chan. Rep. 66, where a plea to a *certiorari* bill of a decree in the inferior court is mentioned.

<sup>4</sup> Harris v. Pollard, 3 P. Wms. 348; s. c. 2 Eq. Cas. Abr. 2; Huggins v. York Building Comp. 2 Eq. Cas. Abr. 3. A person made a defendant by a bill of revivor cannot support, as a defense, a plea previously set up by the original defendant, and overruled. Samuda v. Furtado, 3 Bro. C. C. 70.

revivor by way of plea or demurrer,<sup>1</sup> and there may be great convenience in thus making the objection. For if the defendant objects by answer merely, the point can only be determined by bringing the cause regularly to a hearing; but if the objection is taken by plea or demurrer, it may in general be immediately determined in a summary way. However, if a defendant objects by answer only,\* or does not object at all, yet if it appears to the court that the plaintiff has no title to revive the suit against the defendant, he can take no benefit from it.<sup>2</sup> If a person entitled to revive a suit does not proceed in due time, he may be barred by the statute for limitation of actions, which may be pleaded to a bill of revivor afterwards filed.<sup>3</sup> If a supplemental bill is brought upon matter which arose before the original bill was filed, and this is not apparent on the bill, the defendant may plead that fact.<sup>4</sup> And if a bill is amended by stating a matter arisen subsequent to the filing of the bill, and which consequently ought to have been the subject of a supplemental bill, advantage may be taken of the irregularity by way of plea, if it does not sufficiently appear on the bill to found a demurrer;<sup>5</sup> but if the defendant answers, he waives the objection to the irregularity, and cannot make it at the hearing.<sup>6</sup>†

<sup>1</sup> *Harris v. Pollard*, 3 P. Wms. 348.

<sup>2</sup> *Harris v. Pollard*, 3 P. Wms. 348.

<sup>3</sup> *Hollingshead's Case*, 1 P. Wms. 742; and see 2 Sch. & Lefr. 632, *et seq.*, and the cases cited; and *Earl of Egremont v. Hamilton*, 1 Ball & B. 516.

<sup>4</sup> See *Lewellen v. Mackworth*, 2 Atk. 40; *Baldwin v. Mackown*, 3 Atk. 817.

<sup>5</sup> See *Brown v. Higden*, 1 Atk. 291; *Jones v. Jones*, 3 Atk. 217.

<sup>6</sup> *Belchier v. Pearson*, at the Rolls, 13th July, 1782.

\* To prevent a suit from being revived, either a plea or a demurrer must be put in to the bill of revivor. An answer insisting that the plaintiff has no right to revive is not sufficient: on the contrary, the putting in of an answer is submitting to the revivor. (*Lewis v. Bridgman*, 2 Sim. 465.)

† A plea that a plaintiff in a supplemental bill, as well as in an original bill, has disposed of his share and interest in a company on behalf of the

A cross-bill differing in nothing from the first species of bills, with respect to which pleas in general have been considered, except that it is always occasioned by a former bill, it is not liable to any plea which will not hold to the first species of bills. And a cross-bill in general is not liable to some pleas which will hold to the first species of bills; as pleas to the jurisdiction of the court, and pleas to the person of the plaintiff, the sufficiency of which seem both affirmed by the original bill; unless the cross-bill is exhibited in the name of some person alone, who is alone incapable of instituting a suit, as an infant, a feme covert, an idiot, or a lunatic.<sup>1</sup>

It has been already mentioned<sup>2</sup> that a part of the constant defense to a bill of review, for error apparent on a decree, has been said to be by a plea of the decree;<sup>3</sup> but that a demurrer seemed to be the proper defense, and that the books of practice gave the form of a demurrer only to such a bill.<sup>4</sup> Where any matter beyond the decree, as length of time,<sup>5</sup> a purchase for a valuable consideration, or any other matter, is to be offered against opening of the enrollment, that matter must be pleaded.<sup>6</sup> And if a demurrer to a bill of re-

<sup>1</sup> See above, p. 298, note 1.

<sup>2</sup> Page 298.

<sup>3</sup> *Dancer v. Evett*, 1 Vern. 392; *Carlisle v. Gover*, Nels. 52.

<sup>4</sup> And see *Needler v. Kendall*, Finch, 468.

<sup>5</sup> *Gregor v. Molesworth*, 2 Ves. 109; but see above, p. 299.

<sup>6</sup> *Hartwell v. Townsend*, 2 Bro. P. C. 107, Toml. ed.; and see *Gorman v. M'Culloch*, 5 Bro. P. C. 597, Toml. ed. As instances in which the error alleged was not in the body of the decree, see *Cranborne v. Dalmahoy*, 1 Ch. Rep. 231; *Smith v. Turner*, 1 Vern. 273; and see 2 Ves. 488; and *Bradish v. Gee*, Ambl. 229.

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members of which the original and supplemental bills were filed, and that at the time of filing the bill, he had no interest whatever in any of the proceedings, is not a good plea to such supplemental bill, where the relief sought by it is only a modification or alteration of the relief in the original suit, and where the original and supplemental bills ought therefore to be considered as one bill. (*Small v. Attwood*, 1 Y. & C. Ex. 39.)

view has been allowed, and the order allowing it is enrolled, it is an effectual bar to a new bill of review<sup>1</sup> on the same grounds, and may be pleaded accordingly. To a bill of review of a decree for payment of money, it has been objected by plea that according to the rule of the court<sup>2</sup> the money decreed ought to have been first paid; but the rule appears to have been dispensed with on security given;<sup>3</sup> and as the bill of review would not stay process for compelling payment of the money, it may be doubted whether the objection was properly so made. A bill of review, upon the discovery of new matter, seems liable to any plea which would have avoided the effect of that matter if charged in the original bill.\* It seems to have been doubted whether the fact of the discovery of the matter thus alleged to support a bill of review, can be traversed by plea after the court upon evidence of the fact has given leave to bring the bill, even if the defendant could traverse the fact by positive assertion of some fact which would demonstrate that the matter was within the knowledge of the party, so that he might have had the benefit of it in the original suit. But if the fact of the discovery is in issue in the cause, it ought to be proved, to entitle the plaintiff to demand the judgment of the court on the matter alleged, as ground for reviewing the decree;<sup>4</sup> and it may consequently be disproved by evidence on the part of the defendant. Upon a supplemental bill in the nature of a bill of review of a decree not signed and enrolled,

<sup>1</sup> *Denny v. Filmer*, 2 Cas. in Chan. 133; s. c. 1 Vern. 135; 1 Vern. 417; *Pitt v. Earl of Arglass*, 1 Vern. 441; *Woots v. Tucker*, 2 Vern. 120.

<sup>2</sup> Ord. in Chan. Ed. Bea. 3.

<sup>3</sup> *Savile v. Darcy*, 2 Freem. 172; s. c. 1 Cas. in Chan. 42.

<sup>4</sup> See p. 186.

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\* See Daniel Ch. Plead. & Prac. 1584, 4th Am. ed., by Perkins.



upon the alleged discovery of new matter, it has been said, that if the defendant can show that the allegation is false, he must do so by plea, and that it is too late to insist upon it by answer;<sup>1</sup> but as the bill must allege the fact of discovery, and that fact must be the ground of the proceeding, it should seem that it is equally liable to traverse by answer, and by evidence, as any other fact stated in a bill.\* If a decree is sought to be impeached on the ground of fraud, the proper defense seems to be a plea of the decree, accompanied by a denial of the fraud charged.<sup>2</sup>

If a plaintiff filing a bill to carry a decree into execution has no right to the benefit of the decree, the defendant may plead the fact, if it is not so apparent on the bill as to admit of a demurrer. Bills in the nature of bills of revivor or of supplemental bills, are liable to the same pleas as the bills of whose nature they partake.

Having thus considered some of the principal grounds upon which pleas to the several kinds of bills may be supported, it will be proper to observe some particulars with respect to: 1, the nature of pleas in general; 2, their form; 3, the manner in which they

<sup>1</sup> 2 Atk. 40. The accuracy of this report seems very questionable. The supplemental bill was brought on discovery of an old settlement, found after a decree made in 1733. The cause came on upon the supplemental bill, and a rehearing of the decree complained of, 7 July, 1740. The decree was affirmed, and the supplemental bill dismissed without costs, principally on the ground that length of time, with collateral circumstances, ought to open

rate as a bar to the plaintiff's title under the old settlement, which was dated in 1655; the defendants claiming under a subsequent settlement made in 1694, which had been constantly acted upon by the family. MS. n.; s. c. 2 Eq. Cas. Abr. 579.

<sup>2</sup> *Wichalse v. Short*, 3 Bro. P. C. 558, Toml. ed.; s. c. 7 Vin. Abr. 398, pl. 15; 2 Eq. Cas. Abr. 177; *Loyd v. Mansell*, 2 P. Wms. 73; and see pp. 331 *et seq.*

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\* See 1 Bland Ch. R. 506; Daniel Ch. Plead. & Prac. 1584, 4th Am. ed., by Perkins.

are offered to the court; and 4, the manner in which their validity is decided.

1. In pleading there must in general be the same strictness in equity as at law;<sup>1</sup> at least in matter of substance.\* A plea in bar must follow the bill, and

<sup>1</sup> 1 Vern. 114; 2 Atk. 632; 13 Ves. 233.

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\* Where an information against a company, after stating several charities in which that company alone are interested, contains an allegation as to another charity in which that and another company are jointly interested; and that allegation is afterwards struck out by amendment, in order to save making such other company parties; and in place of such allegation another is substituted, that there are other funds vested in the former company upon "the like or corresponding trusts;" in such case, a plea of the will of the person who created the charitable trust struck out of the information, and that the other company above mentioned are not parties, is bad in point of form, because it is in fact an answer as to that of which it means to protect the defendant from making discovery; and it is also bad in substance, because comparing the amended information with the original, "the like or corresponding trusts," mean trusts for the exclusive benefit of the company interested in the other trusts. (Attorney Gen. *v.* Merchant Tailors' Company, 3 Sim. 323.)

If, to all the relief and discovery of a bill, except so much as seeks a discovery of an alleged promise which constitutes the whole equity, a defendant pleads in bar that no such promise was made, and, by an answer accompanying the plea, again denies the promise, the plea is bad; because the plea is to the bill, taking away that which alone constitutes the equity; so that if issue were taken on it, there would be in the issue no affirmative, but only a negative of that which nobody affirms. (*Denys v. Shuckburgh*, 6 Law J [N. S.] 330, L. C.)

If a plea is coupled with an averment which raises an issue not raised by the bill, and which, instead of supporting the plea, is in fact inconsistent with the plea, the plea will be overruled. (*Emmott v. Mitchell*, 9 Jur. 171, V. C. E.)

If a plea purports to be a plea to the relief only, but yet concludes with a demand of the judgment of the court whether the defendant ought to be compelled to make any other answer, such a plea is informal; for if the plea is to the relief only, the defendant professes that he will give the discovery. (*King v. Heming*, 9 Sim. 59.)

A plea that by the laws of a foreign country an agreement is void, is sufficiently definite, without specifying the particular law which renders the agreement void. (*Heriz v. Riera*, 11 Sim. 318.)

If a bill of discovery is filed in aid of an action, and the right of action

not evade it, or mistake the subject of it.<sup>1</sup> If a plea does not go to the whole bill, it must express to what part of the bill the defendant pleads; and therefore a plea to such parts of the bill as are not answered must be overruled as too general.<sup>2</sup> So if the parts of the bill to which the plea extends are not clearly and precisely expressed; as if the plea is general, with an exception of matters after mentioned, and is accompanied by an answer, the plea is bad. For the court cannot judge what the plea covers, without looking into the answer, and determining whether it is sufficient or not, before the validity of the plea can be considered.<sup>3</sup>

It is generally conceived that a plea ought not to contain more defenses than one; and though a plea may be bad in part and not in the whole,<sup>4</sup> and may accordingly be allowed in part and overruled in part, yet there does not appear any case in which two defenses offered by a plea have been separated, and one allowed as a bar. Thus if a defendant pleads a fine and non-claim, which is a legal bar, and a purchase for a valuable consideration without notice of the plaintiff's claim, which is an equitable bar; if either should appear not to be a bar, as if the defendant by answer

<sup>1</sup> *Asgill v. Dawson*, Bunb. 70; *Child v. Gibson*, 2 Atk. 903.

<sup>2</sup> *Anon.* 3 Atk. 70; *Broom v. Horsley*, Mosely, 40.

<sup>3</sup> *Salkeld v. Science*, 2 Ves. 107; *Howe v. Duppa*, 1 Ves. & Bea. 511.

<sup>4</sup> 1 Atk. 53, 451, 539. 2 Atk. 44, 284; 1 Ves. 206; *Welby v. Duke of Portland*, 2 Bro. P. C. 39, Toml. ed.; 1 Jac. 466.

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is founded upon a variety of circumstances put together, a plea which attempts to show that the action cannot be maintained, by confessing and avoiding some of the circumstances and denying the rest, is not good; because it reduces the plaintiff to the necessity of proving, in a court of equity, without a discovery, that he has a right to support that action. (*Robertson v. Lubbock*, 181.)

should admit facts amounting to notice; or if the plea in respect to either part should be informal; there seems to be no case in which the court has separated the two matters pleaded, and allowed one as a bar and disallowed the other. And as the end of a plea is to reduce the cause, or the part of it covered by a plea, to a single point,<sup>1</sup> in order to save expense to the parties, or to protect the defendant from a discovery which he ought not to be compelled to make; and the court to that end instantly decides on the validity of the defense, taking the plea, and the bill so far as it is not contradicted by the plea, to be true; a double plea is generally considered as informal and improper.<sup>2</sup> For if two matters of defense may be thus offered, the same reason will justify the making any number of defenses in the same way, by which the ends intended by a plea would not be obtained; and the court would

<sup>1</sup> 1 Atk. 54; 1 Bro. C. C. 417; 15 Ves. 82; 1 Ves. & Bea. 153, note, 156, 157; 1 Madd. 194.

<sup>2</sup> Whitbread v. Brockhurst, 1 Bro. C. C. 104; s. c. 2 Ves. & Bea. 153, note; Nobkissen v. Hastings, 4 Bro. C. C. 252; s. c. 2 Ves. jr. 84; Wood v. Strickland, 2 Ves. & Bea. 150; 3 Madd. 8; 4 Madd.

245. But it has been determined, that where great inconvenience would result from obedience to this rule, the court on a previous special application will give to the defendant leave to plead double.\* Gibson v. Whitehead, 4 Madd. 241.

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\* Leave will be given to put in a double plea where extraordinary inconvenience might arise if a double plea were not allowed. Thus, in a suit as to an invention, where the defendant is required to set forth accounts of extraordinary length, at a great expense, and at the risk of making an inconvenient exposure of his affairs, leave will be given to plead, first, that where the invention is new, it is not useful; and, secondly, that where it is useful, it is not new. (Kay v. Marshall, 1 Keen, 190.)

And when it will be no disadvantage to the plaintiff, and a great convenience to the defendant that the defenses should be put in the form of pleas, in order that their validity may be considered before a discovery is enforced, leave will be given to plead to an ejectment bill, first, that a party is not heir, and, secondly, that even if he were heir, the plaintiff's right is barred by the statute of limitations. (Bampton v. Birchell, 4 Beav. 558.)

be compelled to give instant judgment on a variety of defenses, with all their circumstances, as alleged by the plea, before they are made out in proof; and consequently would decide upon a complicated case which might not exist. This reasoning perhaps does not in its extent apply with equal force to the case of two several bars pleaded as several pleas, though to the same matter; and it may be said that such pleading is admitted at law, and ought therefore to be equally so in equity. But it should be considered that a plea is not the only mode of defense in equity, and that therefore there is not the same necessity as at law for admitting this kind of pleading. But though a defense offered by way of plea consist of a great variety of circumstances, yet if they all tend to one point, the plea may be good.<sup>1</sup> \* Thus, a plea of title

<sup>1</sup> *Cann v. Cann*, 1 P. Wms. 725; *Ashurst v. Eyres*, 3 Atk. 341; 15 Ves. 82, 377; *Leonard v. Leonard*, 1 Ball & B. 323; and see 2 Blackst. 1028, as to the distinction between a double plea, consisting of distinct propositions, and a single plea consisting of one connected proposition formed from multifarious circumstances.

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\* A distinct plea may be put in to distinct parts of the relief sought by the same bill. (*Emmott v. Mitchell*, 9 Jur. 171, V. C. E.)

But each "plea, in order to be good, must be an allegation or denial of some leading fact, or of some matters which, taken collectively, make out some general fact." (*Robertson v. Lubbock*, 4 Sim. 179.)

Hence, inasmuch as the fact of a party being heir is consistent with the fact of there being no descent, and as there may have been a descent without a seizin, a plea of not heir, no descent, and no seizin, is a plea of several matters, and multifarious. (*Chadwick v. Broadwood*, 3 Beav. 530.)

A plea that a person had not intermeddled with a testator's estate, and that he had renounced probate, is not a double plea to a bill alleging that he had possessed certain of the testator's effects, and was the personal representative of the testator; for both the averments in the plea only amount to this, that the character of executor never was in him. (*Strickland v. Strickland*, 12 Sim. 253.)

A plea that the plaintiff had not obtained his certificate under a commission of bankruptcy, and that no dividend, or a dividend or dividends

deduced from the person under whom the plaintiff claims may be a good plea though consisting of a great variety of circumstances;<sup>1</sup> for the title is a single point, to which the cause is reduced by the plea.<sup>2</sup> It therefore seems that a plea can be allowed in part only with respect to its *extent*, the quantity of the bill covered by it, and that if any part of the *defense* made by the plea is bad, the whole must be overruled.<sup>3</sup>

A plea must aver facts to which the plaintiff may reply,<sup>4</sup> and not in the nature of a demurrer, rest on facts in the bill.<sup>5</sup> The averments ought in general to

<sup>1</sup> Martin and Martin, House of Lords, 6th March, 1724-5; and *Else v. Dougherty*, 1 P. Wms. 387, note, Mr. Cox's ed.; *Howe v. Duppa*, 1 Ves. & Bea. 511; *Gait v. Osbaldeston*, 1 Russ. 158; 5 C. 5 Madd. 428.

<sup>2</sup> See *Doble v. Cridland*, 2 Bro. C. C. 274.

<sup>3</sup> As instances of a plea not being a complete defense to the bill, or to so much thereof as it purports to cover, see *Moore v. Hart*, 1 Vern. 110; *Sal-keld v. Science*, 2 Ves. 107; *Potter v. Davy*, 3 Vin. Abr. 135; *Hoare v. Parker*,

above, p. 363, note 11; *Jones v. Davis*, 16 Ves. 262; *Chamberlain v. Agar*, 2 Ves. & Bea. 259; *Spottiswood v. Stockdale*, Coop. 102; *Barker v. Ray*, 5 Madd. 64.

<sup>4</sup> 15 Ves. 377.

<sup>5</sup> *Bicknell v. Gough*, 3 Atk. 558; 2 Ves. 296; *Roberts v. Hartley*, 1 Bro. C. C. 56; 6 Ves. 594; *Billing v. Flight*, 1 Madd. 230; *Steff v. Andrews*, 2 Madd. 6. The prominent distinction between a plea and a demurrer (Ord. in Chan. 26, ed. Bea.) here noticed, is strictly true, even of that description

less than fifteen shillings in the pound had been paid, and that the assignee was a necessary party, is not a double plea; because the facts as to the certificate and dividend lead but to one point, namely, the necessity of the assignee being a party. (*Kirkman v. Andrews*, 4 Beav. 554.)

A plea of a stated account, and of a release or receipt of the balance, is not a double plea. And such account, if not impeached by the bill, need not be annexed to the plea. (*Holland v. Sprowle*, 6 Sim. 23.)

So a plea of the statutes of limitation (21 Jac. I, and 9 Geo. IV) is not a double plea; for they ought to be considered as jointly making but one law. (*Forbes v. Skelton*, 8 Sim. 335.)

But a plea which is in effect a plea of the statute of limitations, and of no liability ever incurred, is a double and inconsistent plea, and bad. (*Emmott v. Mitchell*, 9 Jur. 171, V. C. E.)

And a plea averring that a fine was levied of an estate claimed by the bill, and that such estate is the only part of the property claimed in which the defendant has any interest, will be overruled as a double plea. (*Watkins v. Stone*, 2 Sim. 49.)

be positive.<sup>1</sup> In some cases, indeed, a defendant has been permitted to aver according to the best of his knowledge and belief; as that an account is just and true;<sup>2</sup> and in all cases of negative averments,<sup>3</sup> and of averments of facts not within the immediate knowledge of the defendant,<sup>4</sup> it may seem improper to require a positive assertion.\* Unless, however, the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it: and the conscience of the defendant is saved by the nature of the oath administered; which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true. All the facts necessary to render the plea a complete equitable bar to the case made by the bill, so far as the plea extends, that the plaintiff may take issue upon it,<sup>5</sup> must be clearly and distinctly averred.†

of plea which is termed negative (above, p. 321), for it is the affirmative of the proposition which is stated in the bill.

<sup>1</sup> 3 Atk. 590.

<sup>2</sup> 3 Atk. 70; *Burgony v. Machell*, Tothill, 70.

<sup>3</sup> See *Drew v. Drew*, 2 Ves. & Bea. 509.

<sup>4</sup> 2 Ves. & Bea. 162.

<sup>5</sup> *Gilb. For. Rom.* 58; 2 Ves. 296; and see *Carleton v. Leighton*, 3 Meriv. 667.

\* According to the case of *Kirkman v. Andrew*, a plea that the defendant is informed and believes that the plaintiff became bankrupt, is a sufficient plea of bankruptcy; inasmuch as the facts stated in an answer upon the information and belief of the defendant are held to be sufficiently put in issue; and as the allegations in a plea, if they relate to the act of others, however positively made in the plea itself, are sworn to only upon the belief of the defendant. (4 Beav. 554.)

But according to the case of *Small v. Atwood*, a plea that the defendant has been informed and believes that the plaintiff has no interest in the suit is bad; because, in this case, the *onus probandi* being on the defendant, since he undertakes to show that the plaintiff has no interest, he must be as capable of stating his facts positively as of proving them; and if upon issue being taken upon the plea, he were to prove his information and belief, that would not be an answer to the bill. (1 Y. & C. Eq. Ex. 39.)

† In a plea it is unnecessary to negative facts which would defeat the plea, if they are not stated in the bill. But if the plea does contain aver-

Averments are likewise necessary to exclude intendments which would otherwise be made against the

ments negating such facts, such averments are merely superfluous; they do not vitiate the plea. (*Forbes v. Skelton*, 8 Sim. 325.)

"Where a bill alleges a fact, and alleges other circumstances calculated and tending to prove that fact, the defendant cannot plead the negative of the fact, without denying the statements and allegations in the bill which have a tendency to prove it." (*Denys v. Shuckburg*, 6 Law J. [N. S.] 330, L. C.)

If a defendant puts in a negative plea (such as a plea of no tithable things to a bill for tithes), and there is a charge in the bill as to documents from which the plaintiff's right to relief would appear, the defendant must deny such charge by an answer in support of the plea. (*Clayton v. The Earl of Winchester*, 3 Y. & C. Eq. Ex. 426, 683. See also note \* to p. 322.)

If a defendant puts in a plea denying a partnership in a business, and by his answer admits that he is in possession of documents relating to said business, but, "save as aforesaid," denies that he has any documents whereby the truth of the alleged matters would appear, he admits that the truth of the contrary of the plea would appear by evidence in his possession, and this renders the plea bad, although in his answer he goes on to insist, that inasmuch as the documents in his possession relate exclusively to his own title, and do not in any way tend to support the plaintiff's claim, he is not bound to produce them. (*Harris v. Harris*, 3 Hare, 450.)

A plea to a bill for discovery in aid of an ejectment, that the purchase money contracted to be paid for the estate has not been paid or released, is defective in not averring that the money is due, where, from the circumstances of the case, it is probable that it was not the intention of the parties that it should be paid; as where the conveyance was made by a father to his son, and although containing a recital of an agreement for a sale to the son, was yet expressed to be made in consideration of natural affection. (*Drake v. Drake*, 3 Hare, 523.)

If to a bill for an account of partnership transactions, by the executors of a deceased partner, the defendant pleads that for a certain consideration a parol agreement was entered into between the deceased partner and the defendant, and all accounts between them, and all claims of the former in respect to the effects of the partnership and the debts due to and from the same, should be waived; such agreement will be construed to be an agreement that the defendant should take upon himself the discharge of such partnership liabilities (if any) as remained to be satisfied; and the plea will be overruled, if it does not aver that no such liabilities still remained undischarged. (*Brown v. Perkins*, 1 Hare, 564.)

Where a bill is filed to establish a will of real estate, of which it alleges several copies were executed, a plea that the will proved in the ecclesias-



pleader; and the averments must be sufficient to support the plea.<sup>1</sup>

If there is any charge in the bill, which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded, as fraud, or notice of title, that charge must be denied by way of answer, as well as by averment in the plea.<sup>2</sup> In this case the answer must be full and clear, or it will not be effectual to support the plea;<sup>3</sup> for the court will intend the matters so charged against the pleader, unless they are fully and clearly denied.<sup>4</sup> But if they are in substance fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered.<sup>5</sup> Though the court upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude intendments against the pleader, yet if the plaintiff thinks the answer to any of them is evasive, he may except to the sufficiency of the answer in those points.

<sup>1</sup> 2 Ves. 245; 2 Sch. & Lefr. 727; 18 Ves. 182.

<sup>2</sup> See the judgment in *Bayley v. Adams*, 6 Ves. 594; 2 Sch. & Lefr. 727; 2 Ves. & Bea. 364; 5 Madd. 330; 6 Madd. 64; 2 Sim. & Stu. 279; and see above, p. 331, *et seq.*, and p. 345.

<sup>3</sup> 3 Atk. 304; *Radford v. Wilson*, 3 Atk. 815; 3 P. Wms. 145; 5 Bro. P. C. 561, Toml. ed.

<sup>4</sup> 2 Atk. 241; *Gilb. Cas. in Eq.* 185. As an example, see *Hony v. Hony*, 1 Sim. & Stu. 568.

<sup>5</sup> 5 Bro. P. C. 561, Toml. ed.

tical court did not contain certain passages is bad, because it does not negative the fact that the will was as stated in the bill, but traverses the fact of the copy proved in the ecclesiastical court being to the effect stated in the bill, which is quite immaterial in regard to a question of real estate, as the ecclesiastical court has no jurisdiction in cases of real estate. (*Strickland v. Strickland*, 3 Beav. 224.)

Where a defendant, in his answer to a bill for tithes of a mill, says that it is an ancient mill, built before living memory; that no tithes have ever been paid for it; and that it has been always considered exempt from tithes; the exemption is well pleaded. (*Townley v. Colegate*, 2 Sim. 297.)

"A negative plea, as to belief, of no mortgage, not going to material collateral charges tending to that point, is too loose and general." (*Arnold v. Heafield*, 1 M'Clelland & You. 330.)

A defendant may also support his plea by an answer touching anything not charged by the bill, as notice of a title or fraud; for by such an answer nothing is put in issue covered by the plea from being put in issue,<sup>1</sup> and the answer can only be used to support or disprove the plea.<sup>2</sup> But if a plea is coupled with an answer to any part of the bill covered by the plea, and which consequently the defendant by the plea declines to answer, the plea will upon argument be overruled.<sup>3</sup>

Where facts appeared upon an answer to an original bill, which would operate to avoid the defense made by plea to an amended bill, the answer to the original bill was read on the argument of the plea, to counterplead the plea;<sup>4</sup> so it should seem if the answer to an original bill would disprove an averment in a plea to an amended bill, the court might permit it to be read for that purpose.<sup>5</sup>

2. A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the bill. For the purpose of determining the validity of the plea, the bill, so far as it is not contradicted by the plea,<sup>6</sup> is taken for true; and the protestation has probably been used to prevent the same conclusion for other purposes. The extent of the plea, that is, whether it is intended to cover the whole bill, or a part of it only, and what part in particular, is usually stated in the next place; and this, as before observed,<sup>7</sup> must be clearly and distinctly shown. The matter relied upon as an ob-

<sup>1</sup> Gilb. For. Rom. 58, 59.

<sup>2</sup> See 3 Atk. 303.

<sup>3</sup> Cottington v. Fletcher, 2 Atk. 155; Gilb. For. Rom. 57.

<sup>4</sup> Hyliard v. White, in Chan. 15th March, 1745.

<sup>5</sup> See the case of Hildyard v. Cressy, 3 Atk. 303.

<sup>6</sup> See Plunket v. Penson, 2 Atk. 51; 15 Ves. 377.

<sup>7</sup> Page 380.

jection to the jurisdiction of the court, to the person of the plaintiff or defendant, or in bar of the suit, generally follows, accompanied by such averments as are necessary to support it. The plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the suit, or so much of it as the plea extends to; and prays the judgment of the court whether the defendant ought to be compelled further to answer the bill, or such part as is thus pleaded to. If the plea is accompanied by an answer merely to support it, the answer is stated to be made for that purpose, not waiving the plea. If the plea is to part of a bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not before pleaded to, and is preceded by the same protestation against waiver of the plea.

3. A plea<sup>1</sup> is filed like a demurrer in the proper office; and pleas in bar of matters *in pais*,<sup>2</sup> must be upon oath of the defendant; but pleas to the jurisdiction of the court, or in disability of the person of the plaintiff,<sup>3</sup> or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself,<sup>4</sup> or any other court,<sup>5</sup> need not be upon oath.

4. If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. And if the defendant is anxious to have the point determined, he may also take the same proceeding. Upon argument of a plea it may either be allowed simply, or the ben-

<sup>1</sup> A plea must be signed by counsel, unless taken by commissioners. *Simes v. Smith*, 4 Madd. 366. See below, p. 407, as to the taking of an answer.

<sup>2</sup> *Prac. Reg.* 325, Wy. ed.

<sup>3</sup> *Ord. in Chan.* 27, 172, Ed. Bea.

<sup>4</sup> *Prac. Reg.* 324, Wy. ed.

<sup>5</sup> But if a plea of matters recorded be accompanied with averments of matters *in pais*, it must be upon oath. *Wall v. Stubbs*, 2 Ves. & Bea. 354; see above, pp. 318-321.

efit of it may be saved to the hearing, or it may be ordered to stand for an answer. In the first case the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true. If, therefore, a plea is allowed upon argument, or the plaintiff without argument thinks it, though good in form and substance, not true in point of fact, he may take issue upon it, and proceed to disprove the facts upon which it is endeavored to be supported.<sup>1</sup> For if the plea is upon argument held to be good, or the plaintiff admits it to be so by replying to it,<sup>2</sup> the truth of the plea is the only subject of question remaining, so far as the plea extends; and nothing but the matters contained in the plea, as to so much of the bill as the plea covers, is in issue between the parties.<sup>3</sup> If, therefore, issue is thus taken upon the plea, the defendant must prove the facts it suggests.<sup>4</sup> If he fails in this proof, so that at the hearing of the cause the plea is held to be no bar, and the plea extends to discovery sought by the bill, the plaintiff is not to lose the benefit of that discovery, but the court will order the defendant to be examined on interrogatories, to supply the defect.<sup>5</sup> But if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred,<sup>6</sup> even though the plea is not good either in point of form or substance. Therefore, where a defendant pleaded a purchase for a valuable consideration, and omitted to deny notice of the plaintiff's title, and the

<sup>1</sup> Prac. Reg. 330, Wy. ed.

<sup>2</sup> 1 Vern. 72; Prec. in Chan. 58.

<sup>3</sup> 3 P. Wms. 95; Parker v. Blythmore, Prec. in Chan. 58. See Cooper v. Tragonnel, 1 Chan. Rep. 174.

<sup>4</sup> Mos. 73; 2 Ves. 247; Ord v. Hudleston, Dick. 510.

<sup>5</sup> Nels. 119; Astley v. Fountaine, Rep. tem. Finch, 4; 2 Ves. 247; 6 Madd. 63; 2 Sim. & Stu. 278.

<sup>6</sup> See Wichalse v. Short, 3 Bro. P. C. 558.

plaintiff replied, it was determined that the plea, though irregular, had been admitted by the replication to be good, and that the fact of notice not being in issue, the defendant, proving what he had pleaded, was entitled to have the bill dismissed.<sup>1</sup>

If upon argument the benefit of a plea is saved to the hearing, it is considered that so far as appears to the court, it may be a defense; but that there may be matter disclosed in evidence which would avoid it, supposing the matter pleaded to be strictly true; and the court, therefore, will not preclude the question.

When a plea is ordered to stand for an answer, it is merely determined that it contains matter which may be a defense, or part of a defense; but that it is not a full defense, or it has been informally offered by way of plea, or it has not been properly supported by answer, so that the truth of it is doubtful. For if a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled, or ordered to stand for an answer only.<sup>2</sup> A plea is usually ordered to stand for an answer where it states matter which may be a defense to the bill, though perhaps not proper for a plea or informally pleaded.<sup>3</sup> But if a plea states nothing which can be a defense, it is merely overruled. If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers,<sup>4</sup> unless by

<sup>1</sup> *Harris v. Ingledew*, 3 P. Wms. 94, 95.

<sup>2</sup> See *Hildyard v. Cressy*, 3 Atk. 304.

<sup>3</sup> As examples, see *Moore v. Hart*, 1 Vern. 110; s. c. *Ibid.* 201; *Kemp v. Kelsey*, Prec. in Chan. 544; *Salkeld v.*

*Science*, 2 Ves. 107; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404; s. c. 2 Ves. & Bea. 153, note; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Wood v. Strickland*, 2 Ves. & Bea. 150.

<sup>4</sup> *Coke v. Wilcocks*, Mos. 73; 3 P. Wms. 240; 3 Atk. 815.

the order liberty is given to except.<sup>1</sup> But that liberty may be qualified so as to protect the defendant from any particular discovery which he ought not to be compelled to make.<sup>2</sup> And if a plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer as insufficient to the parts of the bill not covered by the plea.<sup>3</sup> If a plea accompanied by an answer is allowed, the answer may be read at the hearing of the cause to counterprove the plea.<sup>4</sup>

There are some pleas which are pleaded with such circumstances that their truth cannot be disputed; and others being pleas of matter of fact, the truth of which may be immediately ascertained by mere inquiry, it is usually referred to one of the masters of the court to make the inquiry. These pleas, therefore, are not usually argued.<sup>5</sup> Thus, pleas of outlawry or excommunication,\* being always pleaded *sub sigillo*, the truth of the fact pleaded is ascertained by the form of pleading, and the suit is consequently delayed until the disability shall be removed, unless the plaintiff can show that the plea is defective in form, or that it does not apply to the particular case, and for these purposes he may have the plea argued. Pleas of a former decree,<sup>6</sup> or of another suit depending,<sup>7</sup> are generally referred to a master to inquire into the fact; and if the

<sup>1</sup> Sellon v. Lewen, 3 P. Wms. 239; Maitland v. Wilson, 3 Atk. 814. See Dryden v. Robinson, 2 Sim. & Stu. 529.

<sup>2</sup> See Alardes v. Campbell, Bunb. 265; s. c. 1 Turn. 133, note; Herbert v. Montagu, Finch, 117; Brereton v. Gamul, 2 Atk. 240; Pusey v. Desbouvrie, 3 P. Wms. 315; King v. Holcombe,

4 Bro. C. C. 439; Bayley v. Adams, 6 Ves. 586.

<sup>3</sup> Coke v. Wilcocks, Mos 73.

<sup>4</sup> 3 Atk. 304. But the plaintiff may not amend his bill as of course after a plea to part of the bill has been allowed, Taylor v. Shaw, 2 Sim. & Stu. 12.

<sup>5</sup> Ord. in Chan. 175, Ed. Bea.

<sup>6</sup> Morgan v. Morgan, 1 Atk. 53.

<sup>7</sup> Ord. in Chan. 98, ed. 1739.

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\* This disability is removed by the stat. 53 Geo. III, c. 127, s. 3.

master reports the fact true, the bill stands instantly dismissed, unless the court otherwise orders.<sup>1</sup> But the plaintiff may except to the master's report, and bring on the matter to be argued before the court;<sup>2</sup> and if he conceives the plea to be defective, in point of form or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued as in the case of pleas in general.<sup>3</sup>

## SECTION II.—PART III.

*Of answers and disclaimers ; and of demurrers, pleas, answers, and disclaimers, or any two or more of them jointly.*

If a plea is overruled, the defendant may insist on the same matter by way of answer.<sup>4</sup> And whatever part of the bill is not covered by demurrer or plea, must be defended by answer,<sup>5</sup> unless the defendant disclaims.\* In treating of answers and disclaimers will be considered : 1. The general nature of answers ; 2. Their form ; 3. The manner in which their sufficiency is decided upon, and deficiency supplied ; and 4. The nature and form of disclaimers.

1. It has been already<sup>6</sup> mentioned that every plaintiff is entitled to a discovery from the defendant,

<sup>1</sup> See *Crofts v. Wortley*, 1 Cas. in Chan. 241. See above, pp. 329, 336.

<sup>2</sup> *Durrand v. Hutchinson*, Mich. 1771, on exceptions.

<sup>3</sup> Ord. in Chan. 176, Ed. Bea. See

*Umlin v. —*, 1 Vern. 332 ; and *Foster v. Vassall*, 3 Atk. 587.

<sup>4</sup> 2 Ves. 492 ; *Earl of Suffolk v. Green*, 1 Atk. 450 ; 1 Cox, 228.

<sup>5</sup> *Prac. Reg. Wy. ed.*

<sup>6</sup> Page 105.

of the matters charged in the bill,<sup>1</sup> \* provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree.† The plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense.<sup>2</sup> He is also entitled to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a court of equity.<sup>3</sup> However, if the discovery sought by a bill is matter of scandal,‡ or will subject the defendant to any pain,

<sup>1</sup> Where the defendants are numerous, each, it seems, is entitled to put in a separate answer, although they should have but one common defense. *Van Soudan v. Moore*, 1 Russ. 441, on appeal. See s. c. 2 Sim. & Stu. 509. [But see 1 Perkins' Dan. Ch. Pr. 730.]  
<sup>2</sup> 2 Atk. 241.  
<sup>3</sup> 2 Ves. 492; 6 Ves. 37, 38; Coop. 214.

\* See note \* to p. 142.

If a bill requires a defendant to answer, but he is not required to answer any of the interrogatories by a note at the foot of the bill, in such case he need not answer any of the interrogatories, but he must put in some answer; for he is only exempted from giving a discovery of facts, and not from stating his line of defense. (*Wilson v. Jones*, 7 Jur. 1102, V. C. E.)

† See *Janson v. Solarte*, 2 Y. & C. Ex. 132.

The rule that where a defendant submits to answer, he must answer fully, does not apply in such a way as to oblige a defendant to discover that which would be altogether immaterial to the relief sought by the bill. (*Wood v. Hitchings*, 3 Beav. 504; *Codrington v. Codrington*, 3 Sim. 519.) For he need not answer at all as to such irrelevant matter, or if it is desirable for his own interest, he may answer only as to a part of it. (*Wood v. Hitchings*, 3 Beav. 504.)

Where an information, after alleging a misapplication of certain funds vested in the defendants upon certain trusts, alleges that there are certain other funds vested in the defendants upon the like trusts, but it does not charge any misapplication of such other funds, or anything which can show that the interference of the court is necessary with respect to them, the allegation as to the last mentioned funds is irrelevant, and therefore need not to be answered. (*Attorney Gen. v. Merchant Tailors' Company*, 5 Sim. 328.)

‡ Where new matter which occurred subsequently to the filing of an original bill is improperly introduced by amendment, instead of by a supplemental bill, and that matter contains scandalous imputations on the



penalty, or forfeiture,\* he is not bound to make it; and if he does not think proper to defend himself from the discovery by demurrer or plea, according to the circumstances of the case, he has been permitted by an-

<sup>4</sup> 15 Ves. 378; and see authorities cited above, p. 288.

character of the defendant, the defendant may answer that matter in order to clear his character, without preventing the bill from being dismissed with costs on the ground of the irregularity of introducing the new matter by amendment. (*Wray v. Hutchinson*, 2 My. & K. 235.)

\* A defendant is not only not bound to answer any question which has a direct tendency to criminate him, but he is not bound to answer any question the answer to which may form a link in the chain of evidence. (*Southall v. ———*, 2 Coll. Ex. Eq. 308.)

A defendant is not obliged to answer so as to expose himself to a forfeiture. So that an heir at law is not obliged to answer interrogatories as to the testator's sanity, where there is a clause in the will revoking an annuity in the event of the heir disputing his will or his competency to make it. And he may avail himself of this exemption although he answers in part, and in so doing may have made admissions which subject him to the operation of the revocation clause. (*Cooke v. Turner*, 14 Sim. 218.)

And so a husband who obtained his marriage license by falsely swearing that the parent's consent to the marriage was given, may by answer decline answering questions relating to the minority of the lady, and the non-consent of her parent, in an information under the marriage act, 4 Geo. IV, c. 76, s. 23, praying for a declaration that he has forfeited his interest in his wife's property: for such a case is within the general rule as to forfeiture. (*Attorney Gen. v. Lucas*, 2 Hare, 566.)

But a party cannot protect himself from discovering whether the consideration of a security on which he has brought an action against the plaintiff in equity was money lent at play, although the stat. 9 Anne, c. 14, s. 1, makes securities for money so lent void, for such a discovery does not subject the defendant in equity to a penalty or forfeiture, but merely prevents him from succeeding in his action. (*Sloman v. Kelly*, 4 Y. & C. Eq. Ex. 169.)

Where the interrogatories of a bill relate to matters as to which the plaintiff is entitled to a discovery, and also to other matters an admission of which would subject the defendant to an indictment or penalties, and which do not form the foundation of any part of the relief which is prayed, and the two subjects are so mixed in the interrogatories that the defendant cannot separate them in his answer, the plaintiff cannot insist upon an answer to any part of the interrogatories. (*Earl of Lichfield v. Bond*, 12 Law J. [N. S.] 329, M. R.)

swer to insist that he is not obliged to make the discovery.<sup>1</sup> In this case the plaintiff may except to the

<sup>1</sup> 3 P. Wms. 238; *Finch v. Finch*, 2 Ves. 491; *Honeywood v. Selwin*, 3 Atk. 276; *Paxton v. Douglas*, 19 Ves. 225; *Parkhurst v. Lowten*, 1 Meriv. 371; 1 Swanst. 192, 305. It has also been held, that a purchaser for a valuable consideration, without notice, may by answer protect himself from making discovery of facts which might defeat his enjoyment. *Jerrard v. Sanders*, 2 Ves. jr. 454; s. c. 4 Bro. C. C. 322; 15 Ves. 378; 1 Ball & B. 325; and see *Lord Rancilffe v. Parkyns*, 6 Dow. P. C. 230; but see *Ovey v. Leighton*, 2 Sim. & Stu. 234; *The Earl of Portarlington v. Souilly*, 7 Sim. 28; *Salmon v. Claggett*, 3 Bland, 125. It seems that in every other case, even in that of a mere witness being made a defendant (see *Cookson v. Ellison*, 2 Bro. C. C. 252; *Cartwright v. Hatley*, 3 Bro. C. C. 238; *Shepherd v. Roberts*, 3 Bro. C. C. 239; 7 Ves. 288; 11 Ves. 42; but see *Newman v. Godfrey*, 2 Bro. C. C. 332), unless perhaps he be a professional person, and the discovery be

sought of matters confidentially communicated to him.\* *Stratford v. Hogan*, 2 Ball & B. 164; if a person answers at all, he may be required to answer all the facts stated in the bill, from which he does not distinctly protect himself from answering by either of the other modes of defense. See *Dolder v. Lord Huntingfield*, 11 Ves. 283, in which the earlier cases are cited. *Faulder v. Stuart*, 11 Ves. 296; *Shaw v. Ching*, 11 Ves. 303; *Rowe v. Teed*, 15 Ves. 372; *Somerville v. Mackay*, 16 Ves. 382; *Leonard v. Leonard*, 1 Ball & B. 323; 3 Madd. 70; ——— *v. Harrison*, 4 Madd. 252, and 1 Sim. & Stu. 6. See, however, the distinction taken below, pp. 401, 402, 403, between the cases in which the defendant by answer denies the title of the plaintiff, in respect of which the discovery is sought, and those in which he thereby denies the validity of the ground upon which that title is alleged by the plaintiff to be founded; and see below, p. 408, note 1.

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\* As the cases respecting privileged communications and documents, and respecting matters relating to the defendant's title, which have been specially noticed by Lord Redesdale, and those upon the same subject which have been adjudged during the period to which the editor's labors are confined, embrace only a portion of that subject; and as that subject is of considerable extent, and involved in much controversy and difficulty, and comprises many cases which are more properly practice cases than cases on pleading, the editor deems it advisable to refer the reader to the learned works on discovery by Sir James Wigram and Mr. Hare, and to Mr. Daniell's valuable treatise on Chancery Practice, in which (as the editor believes) a complete view of the points referred to in this note may be obtained. A statement of some decisions only might tend to mislead. Of the cases on privileged communications and documents, within the last twenty years, the following may, however, be named: *Flight v. Robinson*, 8 Beav. 22; *Holmes v. Baddeley*, 6 Beav. 521; *Steele v. Stewart*, 13 Sim. 533, and 1 Phil. 471; *Mayor and Corporation of Dartmouth v. Holdsworth*, 10 Sim. 476; *Garland v. Scott*, 3 Sim. 396; *Maden v. Veevers*, 7 Beav. 489; *Hughes v. Garnons*, 6 Beav. 352; *Desborough v. Rawlins*, 3 My. & Cr. 315; *Greenleaf v. King*, 1 Beav. 137; *Woods v. Woods*, 4 Hare, 83; *Preston v. Carr*, 1 Y. & J.; *Greenough v. Gaskell*, 1 My. & K. 100; *Earl of Glengall v. Frazer*, 2 Hare, 99, 105; *Att. Gen. v. Lucas*, 2 Hare,

defendant's answer as insufficient; and upon that exception it will be determined whether the defendant is or is not obliged to make the discovery.<sup>1</sup> If the defense which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea;<sup>2</sup> or if it is doubtful whether as a plea it will hold; the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill.<sup>3</sup> Or if the defendant can offer a matter of plea which would be a complete bar, but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favorable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favor, which he cannot set forth by way of plea, or of answer to support the plea, as the expending a considerable sum of money in improvements, with the knowledge of the plaintiff, it may be more prudent to set out the whole by way of answer than to rely on the single defense by way of plea, unless it is material to prevent disclosure of any circumstance attending his title. For, a defense which, if insisted on by a plea, would protect the defendant from a discovery, will not in general do so if offered by way of answer.<sup>4</sup> To so much of the bill as

<sup>1</sup> 2 Ves. jr. 87; and see 1 Ves. jr. 294, note.

<sup>2</sup> *Chapman v. Turner*, 1 Atk. 54.

<sup>3</sup> See *Norton v. Turvill*, 2 P. Wms. 144.

<sup>4</sup> 2 Eq. Cas. Abr. 67; *Richardson v. Mitchell*, Sel. Cas. in Chan. 51; above, p. 396, note 1.

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566; *Clagett v. Phillips*, 2 Y. & C. Chan. Cas. 82; *Herring v. Cloberry*, 1 Phil. 91, 93; *Lord Walsingham v. Goodriche*, 3 Hare, 122; *Bolton v. Corporation of Liverpool*, 1 My. & K. 95; *Hughes v. Biddulph*, 4 Russ. 190.

it is necessary and material for the defendant to answer<sup>1</sup> he must speak directly,\* and without evasion, and must not merely answer the several charges literally, but he must confess or traverse the substance of

<sup>1</sup> It seems, a mere trustee, incumbrancer, or heir, need answer so much only of the bill as applies to him.\* Coop. 215. And further, with respect to materiality of answer, see below, 408, note 1.

\* There is no rule that a man must either admit or deny his own recent facts. So that if he states that he is unable to set forth as to his knowledge, remembrance, information, and belief, respecting the contents or purport of an agreement entered into by him about six years before the filing of the bill, and destroyed by him some months before that time, his answer will not be deemed insufficient. (*Nelson v. Ponsford*, 4 Beav. 41.)

If a defendant says he is an utter stranger to a matter, and cannot form any belief concerning the same, he answers, in effect, as to his information as well as belief. (*Amhurst v. King*, 2 Sim. & Stu. 183.)

In the absence of a particular exemption, if a defendant can give the discovery, he must give it; and if he cannot, he must show that he has done his best to procure the means of giving it. (*Taylor v. Rundell*, Cr. & Phil. 104. See also *Stuart v. Lord Bute*, 11 Sim. 442.)

Hence he is bound to inspect, and answer as to the contents of, all documents that are in his power; and all documents which a defendant has a right to inspect, provided he can enforce that right, are deemed to be in his "power;" and if they are wrongfully withheld from his inspection, he is bound to resort to legal proceedings to enforce his right to inspect them; and the court will allow him time for that purpose. (*Taylor v. Rundell*, 1 Phil. 222. See also *Att. Gen. v. Bailiffs &c. of East Retford*, 2 My. & K. 35.)

And if a bill states a fact not denied by the answer, by which it appears that the defendant has the means of making an inquiry as to a point upon which he is interrogated, he must set forth as to his knowledge, information, remembrance, or belief, with regard to that point. (*Neate v. Duke of Marlborough*, 2 Y. & C. Eq. Ex. 3.) So that if a defendant, who acted in a transaction by his solicitor simply, is interrogated as to communications between such solicitor and the plaintiff, and as to entries made by such solicitor, it is not sufficient for him to say he does not know, and is unable to answer as to his information, belief, or otherwise: he must say that he has endeavored to obtain the information from such solicitor, even though the latter has long ceased to be his solicitor. For the acts of the agent bind the principal; and although the plaintiff might himself make inquiries of the solicitor, and might call him as a witness, yet he is entitled to such an admission of facts from the defendant, to relieve himself from the necessity of adducing proof from other sources. (*Earl of Glengall v. Fraser*, 2 Hare, 99.)

each charge.<sup>1\*</sup> And wherever there are particular precise charges,<sup>2</sup> they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges.<sup>3</sup>† Thus, where a bill required a general

<sup>1</sup> Ord. in Chan. 28, 179, Ed. Bea.; Hind v. Dods, Barnard, 258; s. c. 2 Eq. Cas. Abr. 69; Deane v. Rastrom, Anstr. 64; 2 Ves. & Bea. 162; and see Hall v. Bodily, 1 Vern. 470.

<sup>2</sup> These, however, it seems, to the end mentioned in the text, must be specially interrogated to.† See King v.

Marisal, 3 Atk. 192; Durant v. Durant, 1 Cox, 58.

<sup>3</sup> 2 Eq. Cas. Abr. 67; Paxton's Case, Sel. Cas. in Chan. 53; Prout v. Underwood, 2 Cox, 135; 6 Ves. 792; Wharton v. Wharton, 1 Sim. & Stu. 235; and see Amhurst v. King, 2 Sim. & Stu. 183.

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\* When a defendant answers *conjunctively*, that he is unable to answer several things, his answer is evasive, unless he adds that he cannot answer any of them: as where he says that he cannot set forth when he parted with papers, *and* what has become of them. (Tipping v. Clarke, 2 Hare, 390.)

And where an information prays an account and payment of arrears of rent out of land, and that for that purpose the lands may be ascertained and distinguished, and it charges that the defendant has in his possession deeds relating to the land and to the rent, whereby the truth of the allegations in the information would appear, and the answer denies the defendant's possession of any deeds relating to the land and the rent, or whereby the truth of the matters mentioned in the information would appear, the answer is insufficient, for the defendant is bound to state whether or not he has any deeds relating even to the land alone, for the purpose of enabling the plaintiff to identify the land, which is one link in the plaintiff's title. (Attorney General v. Lord Dinorben, 2 Jur. 129, Ex. Eq.)

† See note \* to p. 142, *supra*.

‡ With regard to the sufficiency of an answer, Sir J. Wigram, V. C., observed, in Tipping v. Clarke: "If the defendant will simply answer in the terms of the bill, he avoids all difficulty on the subject. But if, instead of doing so, he gives an answer which is not precise with reference to all the matters on which he is interrogated, and then endeavors to shelter himself under a general denial, coupled with the words 'except as aforesaid,' or similar expressions, he makes it often difficult to decide whether the answer is sufficient or not. The rule, since I have known the practice of the court, has been that wherever the defendant denies the bill to be true, 'except as aforesaid,' or 'except as appears by the other parts of the answer,' if there be not found on the answer a clear and sufficient state-

account, and at the same time called upon the defendant to set forth whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when, and of whom, and on what accounts such sums had been received, it was determined that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, was not sufficient, and the plaintiff having excepted to the answer on this ground, the exception was allowed, the court being of opinion that the defendant was bound to answer specifically to the specific charges in the bill, and that it was not sufficient for him to say generally that he had in the schedule set forth an account of all sums received by him.<sup>1</sup> \*

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<sup>1</sup> *Hepburn v. Durand*, 20th Nov. 503; but see *White v. Williams*, 8 Ves., 1779, in Chan.; s. C. rep. 1 Bro. C. C. 193.

ment, which to a reasonable extent meets the whole case, the answer is deemed to be evasive." (2 Hare, 383.)

The court never requires a plaintiff to be satisfied with a mere general denial in answer to a specific charge. (*Tipping v. Clarke*, 2 Hare, 389.)

\* A defendant is not bound to set forth a settled account, if the bill charges that if there was any settled account, the same was fraudulent and collusive, and merely prays a discovery in respect of such pretended settled account. (*Davies v. Davies*, 1 Keen, 534.)

A defendant is not bound to set forth accounts where they are of very great length; it is sufficient in such a case to refer to the books in which they are to be found. Nor is it necessary to specify all the documents relating to the subject, where that would occupy a schedule of an oppressive length; it is sufficient to specify the most important, and then to say that there are others contained in boxes or bundles, marked A, B, &c. (*Christian v. Taylor*, 11 Sim. 401.)

Where a banker is required to set forth the particulars of the consideration given by him for a bill of exchange, and he answers that the consideration consisted of cash, bills, and notes, drawn out of his banking house from time to time, in the regular course of dealing between a banker

Although the defendant by his answer denies the title of the plaintiff, yet in many cases he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the discovery. As if a bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes, though the defendant insists upon a modus, or upon an exemption from payment of tithes, or absolutely denies the plaintiff's title,<sup>1</sup> he must yet answer to the quantity of land and value of the tithes.<sup>2</sup> Or if a bill is filed against an executor by a creditor of the testator, the executor must admit assets, or set forth an account, though he denies the debt.<sup>3</sup>\*

But where the defendant sets up a title in himself, apparently good, and which the plaintiff must remove to found his own title, the defendant is not generally compelled to make any discovery not material to the

<sup>1</sup> See, however, *Gilb. Cas. in Chan.*  
229.

<sup>2</sup> *Langham v. —*, *Hardr.* 130.

<sup>3</sup> *Randal v. Head*, *Hardr.* 188; see  
*Sweet v. Young*, *Ambl.* 353; *11 Ves.*  
304.

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and his customers, this is a sufficient answer, without setting out the banking account. (*Webster v. Threlfall*, 2 *Sim. & Stu.* 190.)

A defendant may set out accounts at length, and copies of promissory notes, undertakings, acknowledgments, and checks, where the interrogatories in the bill appear, in effect, though not literally, to require it, and where it appears necessary to refer to them, in order duly to qualify the defendant's statements as to his knowledge of the cash transactions to which the interrogatories relate. (*Davis v. Cripps*, 2 *Y. & C. Chan.* 435.)

Where it is necessary for the sake of perspicuity, a defendant may set forth the information required in a schedule with columns. (*Gompertz v. Best*, 1 *Y. & C. Eq. Ex.* 114.)

\* If a bill is filed by persons claiming to be next of kin, against the administrator, praying the usual accounts, he must set them forth, although by his answer he denies that the plaintiffs are next of kin, and he himself claims to be one of the next of kin. (*Dott v. Hayes*, 10 *Jur.* 628.)

trial of the question of title. Thus, where a testator devised his real estate to his nephew for life, with remainder to his first and other sons in tail, with reversion to his right heirs, and made his nephew executor and residuary legatee of his will, and on the death of the nephew his son entered as tenant in tail under the will; upon a bill filed by the heir at law of the testator, insisting that the son was illegitimate, that the limitations in the will were therefore spent, and that the plaintiff became entitled as heir to the real estate, and praying an account of the personal estate, and application thereof in discharge of debts and incumbrances on the real estate, the defendants against whom the account was sought insisted on the title of the son as tenant in tail under the will, and that they were not bound to discover the personal estate until the plaintiff had established his title. Exceptions having been taken to the answer, and allowed by the master, on exception to his report, the exceptions to the answer were overruled; the court distinguishing this case, which showed a *prima facie* title in the defendant, the son of the nephew, from a mere denial of the plaintiff's title.<sup>1</sup>

So when a bill claimed the tithe of rabbits on an alleged custom, and the defendant denied the custom, it was determined that the defendant was not bound to set forth an account of the rabbits alleged to be tithable;<sup>2</sup> and a like determination was made upon a claim of wharfage, against common right, the title not having been established at law.<sup>3</sup>

<sup>1</sup> Gethin v. Gale, 29th Oct. 1739, in Chan. M. R.; Ambl. 354; cited in Sweet v. Young. See also Gunn v. Prior, cited 11 Ves. jr. 291; s. c. Dick. 657; 1 Cox, 197.

<sup>2</sup> Randal v. Head, Hardr. 188; s. c. Eq. Cas. Abr. 35.

<sup>3</sup> Northleigh v. Luscombe, Ambl. 612.



But where a discovery is in any degree connected with the title, it should seem that a defendant cannot protect himself by answer from making the discovery; and in the case of an account required, wholly independent of the title, the court has declined laying down any general rule,<sup>1</sup> deciding ordinarily upon the circumstances of the particular case. Thus, to a bill stating a partnership, and seeking an account of transactions of the alleged partnership, the defendant by his answer denied the partnership, and declined setting forth the account required, insisting that the plaintiff was only his servant; and the court, conceiving the account sought not to be material to the title, overruled exceptions to the answer for not setting forth the account.<sup>2</sup> And where a plea has been ordered to stand for an answer, with liberty to except to it as an insufficient answer, the court has sometimes limited the power of excepting so as to protect the defendant from setting forth accounts not material to the plaintiff's title, where that title has been very doubtful.<sup>3</sup>

If an answer goes out of the bill to state some matter not material to the defendant's case, it will be deemed impertinent,\* and the matter, upon application

<sup>1</sup> *Hall v. Noyes*, Ld. Chan. 13th March, 1792.

<sup>2</sup> *Jacobs v. Goodman*, in Exch. 16th Nov. 1791; s. c. rep. 3 Bro. C. C. 487, note; and 2 Cox, 282. See *Hall v. Noyes*, 3 Bro. C. C. 483; *Marquis of Donegal v. Stewart*, 3 Ves. 446; *Phelips v. Caney*, 4 Ves. 107; 11 Ves. 42, 293;

*Webster v. Threlfall*, 2 Sim. & Stu. 190; but see ——— *v. Harrison*, 4 Madd. 252.

<sup>3</sup> *Earl of Strafford v. Blakeway*, 6 Bro. P. C. 630, Toml. ed.; *King v. Holcombe*, 4 Bro. C. C. 439; *Bayley v. Adams*, 6 Ves. 586.

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\* Any matter in an answer is impertinent, except that which is called for by the bill, or would be material to the defense with reference to the order or decree, which may be grounded on the bill to which answer is made.

Hence, if an answer to a mere bill of revivor contains long statements

to the court, will be expunged.<sup>1</sup> So in an answer, as in a bill, if anything scandalous is inserted, the

<sup>1</sup> *Alsager v. Johnson*, 4 Ves. 217; *Beaumont*, 5 Madd. 51; *Parker v. Fair-Norway v. Rowe*, 1 Meriv. 347; *French lie*, 1 Sim. & Stu. 295; 2 Sim. & Stu. *v. Jacko*, Ibid. 357. note; *Beaumont v.* 193.

introduced for the purpose of showing that the proceedings of the plaintiff have been irregular and oppressive, such statements are impertinent; because the defendant can have no advantage from them with reference to the order to revive, and his proper way of objecting to irregularity and oppression is by way of motion or petition. (*Wagstaff v. Bryan*, 1 Russ. & My. 28.)

And the answer to a bill of revivor, filed after a decree, must not go into the merits of the original cause, whether the matter he introduces existed at the time of the decree or has arisen since. Such matter, if stated, is impertinent. (*Devaynes v. Morris*, 1 My. & Cr. 213.)

But a defendant to a bill filed to revive a suit on the occasion of an abatement caused by the death or marriage of a plaintiff, may without impertinence state that he, the defendant, has become bankrupt, and object that the plaintiff is not entitled to the same decree as if the defendant had not become bankrupt, although such statements do not tend to show that the plaintiff is not entitled to revive the suit. (*Langley v. Fisher*, 10 Sim. 345.)

As a general rule, words are not impertinent because unnecessary, where they are not irrelevant. (*Marshall v. Mellersh*, 6 Beav. 558.) And where a defendant is called upon to set forth a schedule of deeds in the ordinary form, and without any limitation being required or suggested by the plaintiffs, it is not impertinent to set forth the names of the parties, in addition to the date of the deed and the estate or subject to which it relates. (*Tench v. Cheese*, 1 Beav. 571.)

But when a defendant refers to a book in the plaintiff's possession as containing the information required of him, and thereby makes that book a part of his answer, if he afterwards gives that information it is impertinence. (*Marshall v. Mellersh*, 6 Beav. 558.)

And if a bill is filed for an account of real estates, and a schedule to the answer sets forth the particulars of such estates with undue prolixity, after the manner of the description of the parcels in a deed, it is impertinent. And although there are a few passages intermixed which are not unduly prolix, yet notwithstanding the eleventh order of 1828, a general exception for impertinence will be allowed, if a very great number of exceptions would be required in order to specify the objectionable passages. (*Byde v. Masterman*, Cr. & Phil. 265.)

Each exception for impertinence must be supported *in toto*, or must fail

scandal will be expunged by order of the court.<sup>1</sup> But, as in a bill, nothing relevant will be deemed scandalous.<sup>2</sup> \*

An answer usually begins† by a reservation to the defendant of all advantage which may be taken by exception to the bill, a form which has probably been intended to prevent a conclusion that the defendant, having submitted to answer the bill, admitted everything which by his answer he did not expressly controvert, and especially such matters as he might have objected to by demurrer or plea. The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow,‡ with a

<sup>1</sup> Peck v. Peck, Mos. 45; Smith v. Reynolds, Mos. 69; Ord. in Chan. 23, Ed. Bea.; Corbett v. Tottenham, 1 Ball & B. 61; Barnes v. Saxby, 3 Swanst. 232, n. <sup>2</sup> Mosely, 70; 1 Ball & B. 61; and see Lord St. John v. Lady St. John, 11 Ves. 526.

altogether; so that if any part of the matter complained of as impertinent is not so, the whole exception fails, though some part of the matter complained of is impertinent. (Tench v. Cheese, 1 Beav. 571.)

On this subject, see also note \*, p. 146, *supra*.

\* See note † to p. 146, *supra*.

† If a plaintiff dies before an answer is put in, and the defendant entitles his answer: "The answer of ——— to the original bill of ———, since deceased," it will be ordered to be taken off the file for irregularity in the title. (Upton v. Lowton, 10 Law J. [N. S.] 222, V. C. E.)

‡ An answer must not set up two alternative inconsistent defenses. (Jesus College, Oxford, v. Gibbs, 4 Law J. [N. S.] Ex. 42.)

Where a mere stakeholder, in his answer, submits that the plaintiff is not entitled to the relief prayed, and that the bill ought to be dismissed with costs, he thereby interferes more than is necessary; and therefore if the plaintiff gets a decree in his favor against the principal defendant, there will be a decree as to the shareholder, *with costs*. Whereas, if he only submits in his answer that the bill ought to be dismissed *as against himself*

general denial of that combination which is usually charged in a bill.<sup>1</sup> It is the universal practice to add by way of conclusion a general traverse or denial of all the matters in the bill. This is said<sup>2</sup> to have obtained when the practice was for the defendant merely to set forth his case, without answering every clause in the bill. Though, perhaps, rather impertinent if the bill is otherwise fully answered, and it has been determined to be in that case unnecessary,<sup>3</sup> it is still continued in practice.\* In the case of an infant † the

<sup>1</sup> See above, p. 135.

<sup>2</sup> 2 P. Wms. 87.

<sup>3</sup> 2 P. Wms. 87.

merely, with costs, no costs will be given as against him. (*Osbaldiston v. Simpson*, 13 Sim. 513.)

Where new trustees of a charity, appointed after the old trustees have put in their answer to an information, but before the decree, are not made parties to the cause, and after the decree a supplemental information is filed against such new trustees, they are not so bound by the decree as to be precluded from making a case by way of defense to the suit; for they come in under the founder, and not under the trustees for whom they were substituted, and they could have made a separate defense had they been made parties to the suit, as they ought to have been, before the decree. (*Att. Gen. v. Foster*, 2 Hare, 81.)

A new master and usher of a school are not so bound by a decree against their predecessors, as to be precluded from stating new matter in answer to an original information in the nature of a supplemental one, to show that the decree ought not to be carried into effect against them, for they do not come in by any sort of privity with their predecessors; and although the decree in the original cause may be right with reference to the things alleged and proved in that cause, yet there may be circumstances showing that it would not be right to prosecute it against the new officers. (*Att. Gen. v. Foster*, 13 Sim. 282.)

\* The general traverse is constantly omitted by some draftsmen of the present day.

† In order to enable an infant defendant to enter into evidence in support of facts, he should state them in his answer, instead of putting in the common answer of an infant, if those facts would not otherwise be in issue in the cause. But whatever admissions he may make, or whatever points may be tendered in issue in his answer, the plaintiff is not in any degree exonerated from proving, as against the infant, the whole case upon which he relies. (*Holden v. Hearn*, 1 Beav. 445.)

answer is expressed to be made by his guardian;<sup>1</sup> and the general saving at the beginning, together with the denial of combination, and the traverse at the conclusion, common to all other answers, are omitted. For an infant is entitled to the benefit of every exception which can be taken to a bill, without expressly making it; he is considered as incapable of the combination charged in the bill; and his answer cannot be excepted to for insufficiency.<sup>2</sup> The answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the court to defend the suit.<sup>3</sup> An answer must be signed by counsel,<sup>4</sup> unless taken by commissioners in the country under the authority of a commission issued for the purpose; in which case the signature by counsel is not required,<sup>5</sup> the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant, which in fact was formerly done.<sup>6</sup>

3. If a plaintiff conceives an answer to be insufficient to the charges contained in the bill he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer to the bill.<sup>7</sup> These exceptions must be signed by counsel,<sup>8</sup> and are then delivered to the proper officer, which must be done within a limited time, according to the course of the court,<sup>9</sup> though upon application further

<sup>1</sup> See above, p. 200.

<sup>2</sup> *Copeland v. Wheeler*, 4 Bro. C. C. 256; *Lucas v. Lucas*, 13 Ves. 274; 1 Ball & B. 553. It has been determined also, that the answer of the attorney general cannot be excepted to. *Davison v. Att. Gen. Exchequer*, 30th June, 1813.

<sup>3</sup> See above, p. 200.

<sup>4</sup> 2 Ves. & Bea. 358.

<sup>5</sup> 3 Atk. 440.

<sup>6</sup> See *Brown v. Bruce*, 2 Meriv. 1.

<sup>7</sup> See *Marsh v. Hunter*, 3 Madd. 437, and the cases there referred to in note; *Hodgson v. Butterfield*, 2 Sim. & Stu. 236.

<sup>8</sup> *Candler v. Partington*, 6 Madd. 102; *Yates v. Hardy*, 1 Jac. 223.

<sup>9</sup> 3 Atk. 19; *Thomas v. Llewellyn*, 6 Ves. 323.

time is allowed for the purpose, within certain restrictions.<sup>1</sup> If the defendant conceives his answer to be sufficient, or for any other reason does not submit to answer the matters contained in the exceptions, one of the masters of the court is directed to look into the bill, the answer and the exceptions, and to certify whether the answer is sufficient in the points excepted to or not.<sup>2</sup> If the master reports the answer insufficient in any of the points excepted to, the defendant must answer again to those parts of the bill in which the master conceives the answer to be insufficient; unless by excepting to the master's report he brings the matter before the court, and there obtains a different judgment.<sup>3</sup> But if the defendant has insisted on any matter as a reason for not answering, though he does not except to the master's report, yet he is not absolutely precluded from insisting on the same matter in a second answer,<sup>4</sup> and taking the opinion of the court whether he ought to be compelled to answer further to that point or not.<sup>5</sup>

Where a defendant pleads or demurs to any part of the discovery sought by a bill, and answers likewise, if the plaintiff takes exceptions to the answer before the plea or demurrer has been argued, he admits the plea<sup>6</sup> or demurrer<sup>7</sup> to be good; for unless he admits it to be good it is impossible to determine

<sup>1</sup> *Anon.* 3 Atk. 19; 14 Ves. 536; *Baring v. Prinsep*, 1 Madd. 526.

<sup>2</sup> *Ord. in Chan.* 53, ed. Bea.; *Partidge v. Haycraft*, 11 Ves. 570; 11 Ves. 577; 1 Ves. & Bea. 333. As to the right of the masters to exercise a discretion with regard to the materiality of interrogatories not answered, see *Agar v. Regent's Canal Comp. Coop.* 212; *Hirst v. Pierce*, 4 Pri. Ex. R. 339; *Scott v. Mackintosh*, 1 Ves. & Bea. 503; *Amhurst v. King*, 2 Sim. & Stu. 183.

<sup>3</sup> *Anon.* 3 Atk. 235; *Hornby v. Pemberton*, Mos. 57; *Worthington v. Foxhall*, 3 Barnard, 261; *Finch v. Finch*, 2 Ves. 491; 11 Ves. 577.

<sup>4</sup> *Finch v. Finch*, 2 Ves. 491. See *Ovey v. Leighton*, 2 Sim. & Stu. 236.

<sup>5</sup> As to the practice in case the defendant should put in successively as many as four insufficient answers, see *Farquharson v. Balfour*, 1 Turn. 184.

<sup>6</sup> See *Darnell v. Reyny*, 1 Vern. 344.

<sup>7</sup> See *Boyd v. Mills*, 13 Ves. 85.

whether the answer is sufficient or not. But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer is argued.<sup>1</sup> If a plea or demurrer is accompanied by an answer to any part of the bill, even a denial of combination merely, and the plea or demurrer is overruled, the plaintiff must except to the answer as insufficient.<sup>2</sup> But if a plea or demurrer is filed without any answer, and is overruled, the plaintiff need not take exceptions, and the defendant must answer the whole bill as if no defense had been made to it.<sup>3</sup>

A further answer is in every respect similar to, and indeed is considered as forming part of, the first answer. So an answer to an amended bill is considered as part of the answer to the original bill.<sup>4</sup> Therefore, if the defendant in a further answer, or an answer to an amended bill, repeats anything contained in a former answer,<sup>5</sup> the repetition, unless it varies the defense in point of substance, or is otherwise necessary or expedient, will be considered as impertinent;<sup>6</sup> and if, upon reference to a master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel who signed the answer.<sup>7</sup>

4. A defendant may disclaim all right or title to the matter in demand by the plaintiff's bill, or by any part of it.<sup>8</sup> But a disclaimer cannot often be put in

<sup>1</sup> 3 P. Wms. 327, note (s). See, however, 2 Atk. 390.

<sup>2</sup> Cotes v. Turner, Bunb. 123.

<sup>3</sup> Ibid. As to the practice with reference to the obtaining of time to answer in such a case, see Trim v. Baker, 1 Sim. & Stu. 469; s. c. on appeal, 1 Turn. R. 253, in accordance with Jones v. Saxby, mentioned 1 Swanst. 194, note (a), and overruling Griffith v. Wood, 1 Ves. & Bea. 541.

<sup>4</sup> 3 Atk. 303; Dick. 583; Spurrier v. Fitzgerald, 6 Ves. 548; and see Ovey v. Leighton, 2 Sim. & Stu. 234.

<sup>5</sup> Smith v. Serle, 14 Ves. 415.

<sup>6</sup> 3 Atk. 303.

<sup>7</sup> Ord. in Chan. 167, ed. Bea.; 16 Ves. 234.

<sup>8</sup> See Archbold v. Borrold, Cary, 69; Seton v. Slade, 7 Ves. 265.

alone. For if the defendant has been made a party by mistake, having at the time no interest in the matter in question, yet as he may have had an interest which he may have parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not; and, if the defendant has had an interest which he has parted with, an answer may be also necessary to enable the plaintiff to make the proper party, instead of the defendant disclaiming.\* The form of a disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand, and in some instances, from the nature of the case, this may perhaps be sufficient; but the forms given in the books of practice are all of an answer and disclaimer.

If the defendant disclaims, the court will in general dismiss the bill as against him with *costs*. But it has been said, that if the plaintiff shows a probable cause for exhibiting the bill, he may pray a decree against the defendant, upon the ground of the disclaimer.<sup>1</sup> Where the defendant disclaims, the plaintiff ought not to reply.<sup>2</sup>

<sup>1</sup> Prac. Reg. 175, Wy. ed.

<sup>2</sup> Prac. Reg. 176, Wy. ed.; 3 Atk. 582.

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\* A defendant cannot shelter himself from the necessity of putting in a full answer, by disclaimer of all interest in the matters in the suit, where, although he may have no interest but may have assigned all his interest, yet he is accountable to the plaintiff or to a codefendant; for a man cannot disclaim his liability. (*Glassington v. Thwaites*, 2 Russ. 458.)

And where a bill seeks to compel trustees to pay a fund to the plaintiff, and prays that the costs of the suit may be paid by other defendants, on the ground that they had rendered the suit necessary by setting up a claim to the fund, and the bill contains divers allegations in support of that fact, it is not sufficient for them to put in what they call an answer and disclaimer, merely stating that they do not claim, and never claimed, any interest in the fund, for they must answer every allegation which goes to show that a claim was set up. (*Graham v. Coape*, 3 My. & Cr. 638.)



A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim as to another. But all these defenses must clearly refer to separate and distinct parts of the bill, for the defendant cannot plead to that part to which he has already demurred; neither can he answer to any part to which he has either demurred or pleaded;<sup>1</sup>\* the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant, by answer, claim what by disclaimer he has declared he has no right to.<sup>2</sup> A plea<sup>3</sup> or answer<sup>4</sup> will therefore overrule a demurrer, and an answer<sup>5</sup> a plea;\* and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.

<sup>1</sup> 2 Bro. Parl. Cas. 20, 21.

<sup>2</sup> See the case of Seton v. Slade, 7 Ves. 265.

<sup>3</sup> Dormer v. Fortesque, 2 Atk. 282; 3 P. Wms. 80, 81; Arnold's case, Gilb. For. Rom. 59.

<sup>4</sup> Abraham v. Dodgson, 2 Atk. 157; 3 P. Wms. 81; Sherwood v. Clack, 9 Pri. Ex. 259.

<sup>5</sup> Pierce v. Johns, Bunb. 11; Cottingham v. Fletcher, 2 Atk. 155; 3 P. Wms. 81; Dobbyn v. Barker, 5 Bro. P. C. 573, Toml. ed.; Earl of Clanrickard v. Bourke, 6 Bro. P. C. 4, Toml. ed.; 1 Sim. & Stu. 6; Watkins v. Stone, 2 Sim. & Stu. 560.

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\* See note (\*), page 248, *supra*.

## CHAPTER III.

### OF REPLICATIONS AND THEIR CONSEQUENCES.

A REPLICATION is the plaintiff's answer or reply to the defendant's plea or answer. Formerly, if the defendant by his plea or answer offered new matter, the plaintiff replied specially;<sup>1</sup> otherwise the replication was merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication.<sup>2</sup> If the parties were not then at issue, by reason of some new matter disclosed in the rejoinder which required answer, the plaintiff might surrejoinder to the rejoinder, and the defendant might in like manner ad-surrejoinder, or rebut to the surrejoinder.<sup>3</sup> The inconvenience, delay and unnecessary length of pleading arising from these various allegations on each side,<sup>4</sup> occasioned an alteration in the practice. Special replications, with all their consequences, are now out of use,<sup>5</sup> and the plaintiff is to be relieved according to the

<sup>1</sup> Ord. in Chan. 70, ed. Bea.

<sup>2</sup> West. Sym. Chan. 195 a. 232 b. 246 b.

<sup>3</sup> West. Sym. Chan. 195 a.; Prac. Reg. 371, Wy. ed.

<sup>4</sup> See Ord. in Chan. 70, ed. Bea.

<sup>5</sup> <sup>6</sup> Prac. Reg. 372, Wy. ed. Indeed, if a plaintiff is disposed to controvert a

part of a case made by the defendant's answer, and to admit the rest, he may still put in a replication so far special that it is confined to the particular matter controverted, instead of being a general denial of the truth of the whole answer; and then the defendant is put only to proof of the matter replied to.

form of the bill, whatever new matters may have been introduced by the defendant's plea or answer.<sup>1</sup> But if the plaintiff conceives, from any matter offered by the defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave<sup>2</sup> to amend the bill,<sup>3</sup> and suit it to his case, as he shall be advised.<sup>4</sup> To this amended bill the defendant may make such defense as he shall think proper, whether required by the plaintiff to answer it or not.<sup>5</sup>

According to the present course of the court, although rejoinders are disused, yet the plaintiff, after replication, must serve upon the defendant a subpoena requiring him to appear to rejoin, unless he will appear gratis.<sup>6</sup> The effect of this process is merely to put the cause completely at issue between the parties. For now, immediately after the defendant has appeared to rejoin gratis, or after the return of a subpoena to rejoin served on the defendant, and which by order obtained of course is now usually made returnable immediately, and served on the defendant's clerk in court, the parties may proceed to the examination of witnesses to support the facts alleged by the pleadings on each

<sup>1</sup> *Prac. Reg.* 372, *Wy. ed.*

<sup>2</sup> See 1 *Ves. jr.* 448.

<sup>3</sup> And this will be permitted after replication, and leave will be granted to the plaintiff to withdraw the replication and amend the bill. See *Pott v. Reynolds*, 3 *Atk.* 565; *Pitt v. Watts*, 16 *Ves.* 126; *Cowdell v. Tatlock*, 3 *Ves. & Bea.* 19; *Lord Kilcourcy v. Ley*, 4 *Madd.* 212.

<sup>4</sup> As to the extent to which this liberty may be carried, see 2 *Sch. & Lefr.* 9; *Seeley v. Boehm*, 2 *Madd.* 176; *Maz-zaredo v. Maitland*, 3 *Madd.* 66. As to the consequence of making an entirely new case by the amendment, see *Mavor v. Dry*, 2 *Sim. & Stu.* 113. And as to the adding or striking out a prayer for relief, see *Butterworth v. Bailey*, 15 *Ves.*

358; *Earl of Cholmondeley v. Lord Clinton*, 2 *Ves. & Bea.* 113. But it may be observed that the plaintiff may not amend his bill after plea to part thereof has been allowed, without leave of the court. *Taylor v. Shaw*, 2 *Sim. & Stu.* 12.

<sup>5</sup> The original bill is rendered nugatory by amendment (3 *Madd.* 429); and if the alteration be so considerable as, according to the practice of the court, to make it necessary that a new engrossment should be filed as of record, counsel's signature must be affixed thereto. *Kirkley v. Burton*, 5 *Madd.* 378; *Webster v. Threlfall*, 1 *Sim. & Stu.* 135; *Pitt v. Macklew*, 1 *Sim. & Stu.* 136, n.

<sup>6</sup> *Anon. Mos.* 123, 296; *Flower v. Herbert, Dick.* 349.

side.<sup>1</sup> Where by mistake a replication has not been filed, and yet witnesses have been examined, the court has permitted the replication to be filed *nunc pro tunc*.<sup>2</sup>

<sup>1</sup> Mosely, 296 ; Prac. Reg. 371, Wy. ed. It may be noticed that leave will in some instances be given to withdraw a rejoinder, and rejoin *de novo*. See Berks v. Wigan, 1 Ves. & Bea. 221 ; Brickwood v. Miller, 1 Meriv 4.

<sup>2</sup> Rodney v. Hare, Mosely, 296.

## CHAPTER IV.

### OF INCIDENTS TO PLEADINGS IN GENERAL.

IN the preceding chapters have been considered the nature of the pleadings used in the equitable jurisdiction of the Court of Chancery, and the manner in which they are brought to a termination. Before the proceedings arrive at that point, the court will frequently permit the pleadings filed to be altered, as the purposes of parties may require,<sup>1</sup>\* except in the case of answers put in upon oath, in which the court, for obvious reasons, will not easily suffer any change to be made.<sup>2</sup> After the examination of

<sup>1</sup> As to the amendment of bills, see above, pp. 154, 413; of demurrers, *Glegg v. Legh*, 4 Madd. 208; *Thorpe v. Macaulay*, 5 Madd. 218; and above, p. 308; and of pleas, *Dobson v. Leadbeater*, 13 Ves. 230; *Merrewether v. Mellish*, 13 Ves. 435; *Wood v. Strickland*, 2 Ves. & Bea. 150; *Thompson v. Wild*, 5 Madd. 82.

<sup>2</sup> A special application is necessary for the purpose (4 Madd. 27), and the

court will not as formerly (see 3 Barn. 51; 2 Eq. Cas. Abr. 60; *Wharton v. Wharton*, 2 Atk. 294; *Dagly v. Crump*, Dick. 35; *Bedford v. Wharton*, Dick. 84; *Patterson v. Slaughter*, Ambl. 292; and cases cited, 1 Ves. & Bea. 150, note (a); 10 Ves. 285, 401), give leave to amend the answer itself, except in the case of an infant defendant (*Savage v. Carroll*, 1 Ball & B. 548), and except in cases of mere clerical error † (*Griffiths*

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\* Where a plaintiff amends his bill, after answer, in such a manner that the case made or the relief asked by the bill is totally inconsistent with the case made or the relief asked by the original bill, the bill is demurrable; as where the original bill prays that a bond may be delivered up to be canceled, on the ground of its having been satisfied, while the amended bill prays that an account may be taken of what is due upon the bond. (*Cresy v. Beavan*, 13 Sim. 354.)

† Leave will be given to file a supplemental answer to correct a plain mistake in the original answer. (*White v. Sayer*, 5 Sim. 566.)

And a supplemental answer will be allowed to be filed to state that a passage was hastily inserted by mistake in the answer after it was engrossed, where the application is supported by an affidavit as to the

witnesses<sup>1</sup> no part of the pleadings can be altered or

*v. Wood*, 11 Ves. 62; *Peacock v. Duke of Bedford*, 1 Ves. & Bea. 186; *White v. Godbold*, 1 Madd. 269; *Faircloth v. Webb*, 5 Madd. 73; but see *Ridley v. Obee*, *Wightw.* 32; but, upon its conscience being satisfied that the defendant ought not to be concluded by the answer as upon record (10 Ves. 401; 4 Madd. 27; and see *Tennant v. Wilsmore*, 2 Anstr. 362), if the matter already brought forward be ambiguously stated, and it appear that the defendant meant to swear to it in the sense which he seeks upon his application to put upon it (*Livesey v. Wilson*, 1 Ves. & Bea. 149), or if it be desired to intro-

duce new matter,\* and it appear that the defendant, at the time of putting in the original answer, was not aware thereof (*Wells v. Wood*, 10 Ves. 401), it will permit a supplemental answer to be filed (*Jennings v. Merton College*, 8 Ves. 79; 10 Ves. 285; 19 Ves. 584; *Curling v. Marquis Townshend*, 19 Ves. 628; *Strange v. Collins*, 2 Ves. & Bea. 163; *Edwards v. M'Leay*, 2 Ves. & Bea. 256; 4 Madd. 407), as a mode by which justice may be more surely administered (19 Ves. 631).

<sup>1</sup> As to bills, see *Wright v. Howard*, 6 Madd. 106, and above, p. 154. Where no witness has been examined, an

mistake, and not opposed by a counter affidavit. (*Swallow v. Day*, 2 Coll. Ch. 133).

And leave will be given to file a supplemental answer, even after the cause is in the paper for hearing, in order to correct a date, where the defendant states that he was obliged to insert the date in the former answer from memory, and the correction will have the effect of creating a good defense to the bill. (*Fulton v. Gilmour or Gilmore*, 8 Beav. 154; 1 Phil. 522; see also *Bell v. Dunmore*, 7 Beav. 283.)

Leave will also be given to file a supplemental answer to correct a mistake upon a particular point, where the defendant in his answer has spoken as to his belief only with regard to the point, and where the application for leave is supported by an affidavit that he has since been more correctly informed. (*Frankland v. Overend*, 9 Sim. 365.)

And where a defendant by his answer pleads a modus for all tithes, and afterwards moves to file a supplemental answer stating that he had since discovered that the modus covered part only of the tithes, the court will order the cause to proceed as if the modus had been laid in the manner proposed. (*Podmore v. Skipwith*, 2 Sim. 565.)

But where a bill is filed against a solicitor for negligence in respect to a deed, and by his answer he admits that the firm to which he belonged were paid for drawing the deed, and that the bill of costs is in his possession, he will not be allowed to file a supplemental answer denying those admissions, and stating that he had since discovered, on examining his books, that the deed was drawn by his deceased partner gratuitously. (*Greenwood v. Atkinson*, 4 Sim. 54.)

\* Leave will be given to a defendant before publication has passed, to file a supplemental answer to state information he has received subsequently to the filing of his original answer. (*Farmer v. Farmer*, 6 Jur. 72, V. C. E.)

So leave will be given, after replication, to file a supplemental answer

added to, but under very special circumstances,\* or in consequence of some subsequent event, except, that if the plaintiff at any time discovers that he has not made proper parties to his bill, he may obtain leave to amend his bill for the special purpose of adding the necessary parties;<sup>†</sup> and leave has also been given to

amendment has been permitted after publication passed. *Hastings v. Gregory*, in the Excheq. 19th Nov. 1782; 1 Fowl. Excheq. Pr. 127; *Sanderson v. Thwaites*, in Chan. Trin. 1782. With respect to answers, see *Chute v. Lady Dacres*, 2 Freem. 172; *Mullins v. Sim-*

*monds*, Bunb. 186; *Kingscote v. Bainsby*, Dick. 485; *Tennant v. Wilsmore*, Anstr. 362.

<sup>†</sup> *Anon.* 2 Atk. 15; *Goodwin v. Goodwin*, 3 Atk. 370; 1 Prax. Alm. Cur. Canc. 546; see above, pp. 154, 413.

to a bill for dower, in order to state a fine and non-claim which have been omitted to be stated in the original answer, through ignorance of the levying of the fine. (*Jackson v. Parish*, 1 Sim. 505.)

And where a plaintiff claims a share of an intestate's estate under the statute of distributions, and the defendant, after filing his answer, discovers that the intestate was domiciled in a foreign country, leave will be given to file a supplemental answer for the purpose of stating that fact. (*Tidswell v. Bowyer*, 7 Sim. 64.)

But after a decree *nisi* in a tithe suit, the defendant will not be allowed to file a supplemental answer, setting up a *modus* founded on evidence with which the defendant has subsequently become acquainted, even though the defendant offers to indemnify the plaintiff as to any extra costs occasioned by setting up a new defense; for, in such case, it is impossible to put the plaintiff in the same situation as he would have been in if this defense had been stated on the record in due time. (*M'Dougal v. Purrier*, 4 Russ. 486.)

\* See *supra*, pp. 159 and 160, and notes.

Where, at the time of amending his bill, a plaintiff has changed his residence, it should be stated by amendment, for the rule that subsequent facts are the proper subject of a supplemental bill, and not of amendment, does not apply to a mere change of residence. (*Kerr v. Gillespie*, 7 Beav. 269.)

By answering an amended bill a defendant does not preclude himself from the right of objecting at the hearing to matter originally introduced into the bill by amendment, where he takes the objection by his answer, and reserves to himself the same benefit of it as if he had pleaded it in bar. (*Milligan v. Mitchell*, 1 My. & Cr. 433.)

† An order to amend as the plaintiffs may be advised does not authorize the striking out of the names of coplaintiffs. (*Sloggett v. Collins*, 13 Sim. 456.)

amend the prayer under particular circumstances.<sup>1</sup> If any event happens which alters the interest of any party, or gives any new interest to any person not a party, the plaintiff may file a supplemental bill, or bill of revivor, as the occasion may require. And if the plaintiff thinks some discovery from the defendant, which he has not obtained, is necessary to support his case, he may file a supplemental bill to obtain that discovery.<sup>2</sup> He may also file a supplemental bill to put in issue any matter necessary to his case when he cannot obtain permission to alter his original bill by amendment;\* but he cannot, upon such a supplemental bill, examine witnesses to any matter in issue by the original bill.<sup>3</sup>

If upon hearing the cause the plaintiff appears entitled to relief, but the case made by the bill is insufficient to ground a complete decree, the court will sometimes give the plaintiff leave to file a supplemental bill, to bring the necessary matter, in addition to the case made by the original bill, before the court.<sup>4</sup> If the addition of parties only is wanted,<sup>5</sup> an order is usually made for the cause to stand over, with liberty to amend the bill by adding the proper parties;† and

<sup>1</sup> *Cook v. Martin*, 2 Atk. 2; *Harding v. Cox*, 3 Atk. 583; *Palk v. Lord Clinton*, 12 Ves. jr. 48.

<sup>2</sup> *Boeve v. Skipwith*, 2 Chan. Rep. 142; *Goodwin v. Goodwin*, 3 Atk. 371; *Usborne v. Baker*, 2 Madd. 379.

<sup>3</sup> *Bagenal v. Bagenal*, 6 Bro. P. C. 81, Toml. ed.

<sup>4</sup> 3 Atk. 133.

<sup>5</sup> See above, pp. 154, 413.

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\* See *supra*, pp. 159 and 160, and notes.

† Under an order, made on the hearing, that the cause should stand over, and that the plaintiffs should be at liberty to amend their bill for the purpose of adding parties, as they might be advised, or of showing why they were unable to bring all proper parties before the court, the plaintiffs are not entitled to add parties as coplaintiffs, and introduce new matter explaining the interests of such new coplaintiffs, because the plaintiffs would thereby be substituting a new record; so that if the witnesses



in some cases where a matter has not been put in issue by a bill with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration.<sup>1</sup>

The court, considering infants as particularly under its protection, will not permit an infant plaintiff to be injured by the manner in which his bill has been framed. Therefore, where a bill filed on behalf of an infant submitted to pay off a mortgage, and upon hearing the cause the court was of opinion that the infant was not bound to pay the mortgage, it was ordered that the bill should be amended by striking out the submission.<sup>2</sup> And where a matter has not been put by the bill properly in issue, to the prejudice of the infant, the court has generally ordered the bill to be amended.<sup>3</sup>

A like indulgence has been granted to a defendant when upon hearing a cause it has appeared that he has not put in issue by his answer facts which he ought to have put in issue, and which must necessarily be in issue to enable the court to determine the merits of the case, the defendant being permitted to amend his answer by stating those facts. This has formerly been done in the exchequer, where a modus had been set up as a defense to a bill for tithes; and it appeared from the evidence in the cause that there was probably

<sup>1</sup> *Filkin v. Hill*, 4 Bro. P. C. 640, Toml. ed. As to the practice in case of neglect to amend within a reasonable time, see *Cox v. Allingham*, 3 Madd. 393.

<sup>2</sup> 1 P. Wms. 428.

<sup>3</sup> See p. 120; *Napier v. Lady Effingham*, 2 P. Wms. 401, 403. And see *Bennet v. Lee*, 2 Atk. 529.

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swore falsely, and their depositions were read, they could not be indicted for perjury, because they would be depositions in a cause of which the record no longer existed. (*Milligan v. Mitchell*, 1 My. & Cr. 433.)

a good ground for opposing the plaintiff's claim, though the defendant had mistaken it, and the court permitted him to amend his answer;<sup>1</sup> but this has been refused in other cases. Where an answer has been prejudicial to a defendant from a mere mistake, upon evidence of the mistake an amendment has been permitted.<sup>2</sup> This indulgence has been extended, after much consideration, beyond mere mistake, where by the answer an important fact was imperfectly put in issue, and no witness had been examined, the cause being heard on bill and answer.<sup>3</sup> In general, however, this indulgence is confined to mere mistake or surprise.<sup>4</sup> A distinction has also been made between the admission of a fact, and the admission of a consequence in law or in equity.<sup>5</sup> Where a defendant after putting in an answer discovered a ground of defense to the bill of which he was not before informed, a purchase by the person under whom he claimed without notice of the plaintiff's title, which could only be used by way of defense, and could not be the ground of a bill of review, the court allowed the answer to be taken off the file, and the new matter to be added, and the answer resworn.<sup>6</sup> Where a fact which may be of advantage to a defendant has happened subsequent to his answer, it cannot with propriety be put in issue by

<sup>1</sup> *Phillips v. Gwynne*, Exchequer, Easter, 1779. See also, *Filkin v. Hill*, 4 Bro. P. C. 640, Toml. ed.; 2 Anstr. 443.

<sup>2</sup> *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424.

<sup>3</sup> *Powell v. Hill*, in Chan. The cause came first before the master of the rolls, who made an order, giving liberty to the plaintiff to amend the bill, and to the defendant to amend the answer, to which the plaintiff might reply and go to issue. On appeal to the chancellor the order was affirmed, 19th March, 1735, MS. N.; *Countess of Gains-*

*borough v. Gifford* (since reported 2 P. Wms. 424), cited as determined on several precedents. But see *Sorrell v. Carpenter*, 2 P. Wms. 482.

<sup>4</sup> 2 Bro. C. C. 619. See *Chute v. Lady Dacres*, 2 Freem. 173.

<sup>5</sup> See *Pearce v. Grove*, 3 Atk. 522; and *S. C. Ambl. 65*, but very differently stated.

<sup>6</sup> *Patterson v. Slaughter*, Ambl. 292. As to amending an answer, and filing a supplemental answer instead of amending and reswearing the original answer, see above, p. 415, note 2.

amending his answer. If this appears to the court on the hearing, the proper way seems to be to order the cause to stand over till a new bill in which the fact can be put in issue be brought to a hearing with the original suit;<sup>1</sup> and a bill for this purpose seems to be in the nature of a plea *puis darrein continuance* at the common law.

Sometimes, upon hearing of a cause, it has appeared that a matter properly in issue, or at least stated in the proceedings, has not been proved against parties who have admitted it by their answers, although not competent so to do for the purpose of enabling the court to pronounce a decree. In these cases the court has permitted the proper steps to be taken to obtain the necessary proof; and for this purpose has suffered interrogatories to be exhibited;<sup>2</sup> and where the plaintiff has neglected to file a necessary replication, has allowed him to supply the defect.<sup>3</sup> Thus, where a bill was filed on behalf of creditors, for satisfaction out of real and personal estates devised to trustees for that purpose, and, subject to that charge, in strict settlement, and the answers of the tenant for life, and of the first remainder-man in tail, who was an infant, were not replied to, the court, on hearing, directed that the plaintiffs should be at liberty to reply to those answers, and exhibit interrogatories, and prove their debts against those defendants, as they had before proved them against the trustees; and reserved the consideration of the directions necessary to be given upon such new proof.<sup>4</sup>

<sup>1</sup> Hayne v. Hayne, 3 Chan. Rep. 19.

<sup>2</sup> See 2 P. Wms. 463; and see 3 P. Wms. 289; Smith v. Althus, 11 Ves. 594; Willan v. Willan, 19 Ves. 590; s. c. Coop. 291; Swinford v. Horne, 5 Madd. 379; Moons v. De Bernales, 1

Russ. 301; Abrams v. Winshup, 1 Russ. 526.

<sup>3</sup> See above, p. 414.

<sup>4</sup> Lambert v. Ashcroft, at the Rolls, 18th Feb. 1779.

In most of these cases the indulgence given by the court is allowed to the mistakes of parties, and with a view to save expense. But when injury may arise to others the indulgence has been more rarely granted; and so far as the pendency of a suit can affect either the parties to it or strangers, matter brought into a bill by amendment will not have relation to the time of filing the original bill, but the suit will so far be considered as pendent only from the time of the amendment; <sup>1</sup> except that where a bill seeks a discovery from a defendant, and having obtained that discovery, the bill is amended by stating the result, it should seem that the suit may, according to circumstances, be considered as pendent from the filing of the original bill, at least as to that defendant, and perhaps to the other parties, if any, and to strangers also, so far as the original bill may have stated matter which might include in general terms the subject of the amendment.

Though in general, with respect to the original parties, and their interests, no amendment will be permitted after the cause is at issue, and witnesses have been examined, and publication passed; <sup>2</sup> yet a plaintiff has been permitted under such circumstances, to amend his bill by adding a prayer omitted by mistake. <sup>3</sup> Even upon the hearing, as already noticed, <sup>4</sup> the court having the whole case before it, and being embarrassed in its decision by defects in the pleadings, has permitted

<sup>1</sup> 2 Atk. 218.

<sup>2</sup> Anon. Barn. 222; 2 Anstr. 362. And see above, pp. 416-418, and notes. It may be observed, that in such a case the plaintiff must generally apply to the court for liberty to withdraw his replication, as well as to amend his bill. 1 Atk. 51; *Motteux v. Mackreth*, 1 Ves. jr. 142; 1 Turn. 24; see above, cases cited, p. 154, note; and p. 413, notes 4 and 5.

<sup>3</sup> *Harding v. Cox*, 3 Atk. 583.

<sup>4</sup> Pp. 418-420. And here it may be remarked, that an amendment of the bill will be permitted after a demurrer or a plea has been filed, but generally not after it has been set down to be argued. *Anon. Mos.* 301; *Vernon v. Cue*, Dick. 358; 1 Ves. jr. 448; *Carleton v. L'Estrange*, 1 Turn. 23.

amendments both of bills<sup>1</sup> and answers,<sup>2</sup> under very special circumstances. Where new matter has been discovered, by either plaintiff or defendant, before a decree has been pronounced deciding on the rights of the parties, a supplemental or cross-bill has been permitted, to bring such matter before the court to answer the purposes of justice, instead of allowing an amendment of a bill or answer, where the nature of the matter discovered would admit of its being so brought before the court; and after a decree, upon a similar discovery, a bill of review, or a bill in nature of a bill of review, has been allowed for the same purpose, both those forms of proceeding being in their nature similar to amendments of bills or answers, calculated for the same purposes, and generally admitted under similar restrictions. It may, however, happen that by the mistake, or negligence, or ignorance of parties, their rights may be so prejudiced by their pleadings that the court cannot permit important matter to be put in issue by any new proceeding without so much hazard of inconvenience, that it may be better that the individual should suffer an injury than that the administration of justice should be endangered by allowing such proceeding.

<sup>1</sup> See above, pp. 154, 418, 419.

Gifford, 2 P. Wms. 424; 1 Cox, 159.

<sup>2</sup> See *Countess of Gainsborough v.* See above, p. 419.



# OF PRACTICE IN SUITS IN EQUITY.

BY SAMUEL TYLER.

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## PART I.

### MINISTERIAL AGENTS.

*Practice of the Court of Chancery* has heretofore been, both in England and in this country, the designation of practice in equity. But as the office of chancellor, with the peculiar functions which gave significance to the name of his court, as *chancery*, has been abolished in the several States of this country where it existed, and there never was a chancellor of the United States, and the Courts of Chancery are only courts administering equity, and usually, in this country, are the same judges who administer law, sitting in equity, and administering it as a separate jurisprudence, the practice should be called practice in equity. Though the terms equity and chancery are constantly used synonymously, they never signified the same thing. Chancery denoted the court, and equity the scheme of jurisprudence administered by it.\* The Court of Chancery possessed an ordinary and an extraordinary jurisdiction. In its former capacity it was a court of law, and was called the Petty Bag side; in its latter, it was a court of equity, and proceeded according to equity and good conscience. And a bill in equity was a suit on the equity side of the Court of

Chancery, as it is now, a suit on the equity side of the court, where the same judges who administer law also administer equity.

Practice in equity requires many ministerial officers, with different functions, to carry out its requirements. And though the simpler equity procedure used in the courts of this country does not need all the officers which belonged to the court of the Lord High Chancellor of Great Britain, yet most of the duties performed by those officers are involved in the equity practice of this country, and are performed by different officers, whose functions and duties are to be learned from the practice of the High Court of Chancery in England, as set forth in English and American treatises on the subject. The best succinct account of the officers of the High Court of Chancery in England, and their various functions in the administration of equity, is contained in the first chapter of the first volume of Newland's Chancery Practice, and is very instructive in regard to the functions and duties of the officers who carry into effect the requirements of practice in equity in the courts of this country.

The first officer in the ministerial duties of practice in equity is the register, who is, in this country, usually the clerk of the law side of the court. The register is the keeper of the records and proceedings of the court. He also makes out and issues its processes, and as the general clerk of the court, he is charged with all clerical duties which are not particularly assigned to others.

Master in chancery is an important officer in the practice of the courts of equity, both Federal and State, with powers similar to those exercised by the English masters, but variously modified by statute.



It is impossible to specify every head of reference made to a master by the court, because they are almost as numerous as the matters belonging to equity jurisdiction. Besides matters which relate to the regularities of the proceedings of the court, it is the duty of the master to examine and digest accounts; to prepare the materials on which a decree or final disposition of the case may be made, and to report the result of his examinations, subject to all exceptions by the parties, for the further order of the court. In the discharge of his duties, the master must confine himself strictly to that which appears on the face of the proceedings and proofs, and refrain from suggesting any objection prejudicial to any party which the court, in its regular course, would not itself notice and sustain. As an incident to every reference of a case to the master, he is thereby authorized to take any testimony deemed requisite in relation to any account which may be necessary, or which the parties may wish to be stated by him. Though the office of master is in the main judicial, he nevertheless makes sales of property and settlements of deeds, the appointment of new trustees, and does many other ministerial duties directed by the court. In some of the States of our Union it is usual to refer cases of account to commissioners clothed with powers for the purpose, corresponding to those which are exercised by an English master in chancery. At an early period this was the practice in Maryland, but by an act of 1785, c. 72, sec. 17, the chancellor was authorized to appoint an accounting officer, called auditor, clothed for that purpose with the powers of an English master in chancery. He is clothed with the power to examine witnesses, and to do all acts necessary to enable him

to state an account, and to report upon any matter referred to him by the court, just as it is lawful for a master in chancery to do, and subject to the same limitations. But, as in Maryland, any objection to a bill for scandalous or impertinent matter is taken by petition or exception, and is determined in the first instance by the court, no such objection is ever referred to the auditor, as it is to an English master in chancery. The auditor is now an officer of the equity courts in Maryland and in the District of Columbia, but is a name not known to general equity practice. He has no judicial power; his office is entirely ministerial.

The office of master in chancery has been abolished in England, by the act of 15 & 16 Vict. 6, 8, and the functions of his office are performed by other agency.

Trustee is also an officer belonging to the practice of some courts of equity in the United States, though not known to general equity practice. Chancellor Bland, in the first volume, p. 139, of his Reports of cases decided in the High Court of Chancery of Maryland, says: "It has been the practice of this court, for a long time, in a great variety of cases, but particularly in creditors' suits, to have its decrees and orders carried into effect by a kind of occasional executive agents, called trustees, who perform offices in many respects entirely analogous to those of the regular executive officers of the courts of common law; and similar to those which, in the English Court of Chancery, are performed by the regularly constituted officers of that court, called masters in chancery. The trustees of this court hold a place under it, and discharge their duties in a manner entirely unknown to the English chancery system. The principles by which

they have been governed have grown out of the nature of the cases in which they have been employed. \* \* \* Trustees appointed and employed by this court have always been considered as its ministerial officers; and, in whatever way they have originated, the power to employ such agents having been recognized and affirmed by several legislative enactments, it may be now considered as finally and firmly established."

The decree or order referring a case to a master in chancery or to an auditor always recites the matters referred for investigation; and a decree appointing a trustee as an agent of the court declares for what purpose he is appointed, and prescribes his course of proceeding. The most common purpose for which he is appointed is to make sale of real estate, which is one of the functions of a master in chancery.

Examiners are important officers in equity procedure. In the English Court of Chancery there were two examiners. Their duties were to receive all interrogatories for the examination and cross-examination of witnesses, in any cause depending in the Court of Chancery, and to examine and cross-examine such witnesses in writing, and to read over such depositions to the witnesses previously to their signing the same; to certify in writing the different documents deposed to on their examination; to sign notices for the attendance of witnesses to be served with subpoenas; to grant certificates that interrogatories are or are not filed, and that witnesses have or have not attended for examination, and such other certificates as occasion may require.

Besides examiners, who are permanent officers of the court, there are occasional executive agents employed by the English Court of Chancery, called

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commissioners, whose duty it is to examine witnesses. When witnesses are examined in London, they are examined before examiners; but when they are examined in the country, they are examined by commissioners appointed for the purpose, whose duties and course of proceeding are the same as those of the examiners.

In some of the United States, courts of equity appoint officers called standing commissioners, corresponding with examiners in the English Court of Chancery. And the same courts also issue special commissions, as is done in England, when the examination of witnesses cannot be conducted before the standing commissioners, as when the witnesses to be examined are not within the jurisdiction of the court, or there are other difficulties in examining them before the standing commissioners.

Process from the equity courts of the States is executed by the sheriff, and from the equity courts of the United States, by the marshal, both of which officers also execute process from the law side of their respective courts. An occasional executive officer, called a messenger, is, under certain circumstances, appointed by the courts of equity to execute particular process, instead of the sheriff or marshal.

## PART II.

## THE REGULAR COURSE OF A SUIT UP TO DECREE.

## SECTION I.

*Proceedings up to answer.*

Neither relief nor discovery can be obtained in equity unless asked for in proper form. A great body of rules exists as to the form and mode in which matters are to be brought before the court. These rules are divided into two great branches—the rules of pleading and the rules of practice. The rules of pleading, as we have seen, tell what is the most efficient form to adopt in shaping the written statements of their respective sides of cases before the court, by the plaintiff and the defendant. The rules of practice, of which we shall proceed to treat, tell in what manner these written statements of the respective parties should be brought under the notice of the court, and what steps taken to obtain the benefit of the respective statements in the pleadings.

Filing a bill, as we have seen, is the regular and most formal mode of commencing proceedings in equity, and is called a suit. When the bill is filed, an answer to it may be obtained from the defendant. And then a decree may be procured from the court, giving the relief to which the plaintiff has shown himself entitled. But a decree is in general by no means the end of the suit. And the proceedings after the decree assume a very different character from what they had been before the decree. And often, in the course of a suit, it becomes necessary to adopt measures which cannot be considered as forming part of the ordinary course of equity procedure.

*Appearance of the defendant.*

The bill is filed by the solicitor of the plaintiff, with the register, who enters it upon the docket of the court, as filed that day. And by the regular and most formal practice, the defendant is notified of the suit, by the writ of subpoena, issued as of course by the register, and served by the sheriff or other officer. In the earliest period of equity practice, the subpoena was issued before bill filed; but that was forbidden by the statute 4 Anne, c. 16, s. 22. In some courts at the present day the defendant is notified of the suit by the service upon him of a copy of the bill, certified that it has been filed; and there are in some courts other modes of notice of the suit to the defendant.

After the defendant has been notified of the suit, he must appear. If he does not, there are processes to compel his appearance. His appearance is entered on the docket of the court by the register, whether he appears voluntarily or by compulsion; and sometimes, where the defendant cannot be reached by process, the court, under statutory authority, orders his appearance to be entered. For it is a rule in equity practice, that no decree can be passed against a defendant without his real or constructive appearance. By his appearance, he submits to the jurisdiction of the court. By statutory enactment, decrees *pro confesso* have been introduced into equity practice in England, and also in this country, against non-resident, absconding, or contumacious defendants. The decree confesses the statements in the complainant's bill. In a case where the complainant requires discovery in aid of his pleadings, or for the purpose of another suit, a decree *pro confesso*, in default of answering the bill, is the only act of the

court which can be of avail to the plaintiff. Since the introduction of this modern practice, the old processes of compelling appearance have fallen into comparative disuse.

### *Defense.*

We come now to the consideration of the steps which the defendant must take to resist the plaintiff's claim. These steps have been shown in our dissertation on pleading in equity, prefixed to this volume, and in the volume itself.

The first in the order of defenses is the demurrer, the function of which has already been considered.

On receiving notice that a demurrer has been filed, if the solicitor for the plaintiff thinks that the bill is open to the objection taken by the defendant, he should amend his bill, which he will be at liberty to do on payment of costs. But if the plaintiff consider that the demurrer is groundless, he must have it set down, in order to take the judgment of the court on the point. When the demurrer comes on for hearing, the defendant may raise any objection to the bill which could have been taken by demurrer, although the objection be not specifically pointed out; which is called demurring *ore tenus*. If the demurrer be held sufficient when argued, there is an end of the suit. But if the demurrer be overruled on argument, the defendant must resort to some other defense. The defendant may, if he please, have the demurrer set down. By setting down is meant, that the name of the cause is entered at the bottom of a list which are about to come on for hearing. And in the case of a demurrer, the court will sometimes grant, on application, that the cause may be placed at or near the top of the list, so

that it may come on soon, where it is thought to be put in merely to gain time. Notice of the setting down is given to the other party by service of a copy of the order for that purpose.

When the day of hearing arrives, the cause is called in its turn, and the counsel for the defendant urges his objections to the bill; and then the plaintiff's counsel supports the bill, and the defendant's counsel replies, according to the regular course of forensic discussion. In the argument, the allegations of fact in the bill are admitted as true; but the rule does not extend to conclusions of law which may be stated in the bill, as is sometimes done. No matter, not on the face of the bill, can have any bearing on the question, whether the allegations of the bill support the plaintiff's claim to relief, which is the sole question raised by the demurrer. A demurrer must be so framed as to rely only on facts stated in the bill, otherwise it will be what is called a *speaking demurrer*, and will be overruled.

The second, in the order of defenses, is the plea.

The nature and function of pleas, and the different kinds of pleas, have been considered in our dissertation on pleading, prefixed to this volume, and the subject is fully discussed by Mitford in the body of the volume. According to modern practice, pleas are not favored in equity, and much strictness is required in stating the matter; and any irregularity will cause the plea to be overruled.

In considering the plea, the first question will be, whether it is sufficient in law. If the plaintiff thinks that it is not, his course is to *set down the plea for hearing*; which is equivalent to demurring to it. If the plaintiff thinks that the plea is sufficient in law, he must then ask himself whether the allegation in it is



true ; if it is not, he must reply by traversing its truth. If the allegation be both sufficient and true, but the plaintiff can produce new matter which will avoid its effect, he must *amend* his bill, introducing, by way of pretense or otherwise, a statement of the matters contained in the plea, and also a substantive allegation of the new matter by which he avoids it. When the plea is both sufficient and true, the plaintiff must *abandon his suit*, and pay the defendant his costs.

By replying to a plea the plaintiff admits that it is sufficient in law, and cannot afterwards raise any question as to its sufficiency. (6 Wheaton, 472.) And if the defendant, after replication, fail to prove the truth of the plea, he will be compelled to give the discovery required, not by way of formal answer including his own case, but by way of answers to interrogatories of the complainant, put for the purpose of eliciting the required discovery.

Upon the filing of a plea, whether it is to the whole or part of the bill, either party may at once set it down for argument. And if the plaintiff does not, within a time prescribed by rules of the court, ask for leave to amend his bill, or does not reply to the plea, the plea will be held good, and the defendant will be entitled to his costs, and may, if the plea be to the whole bill, obtain, as of course, an order to dismiss the bill.

A plea is set down for hearing in the same manner as that already described in the case of a demurrer ; and the court will often give leave to advance it, so as to dispose of it sooner than its regular course. And the case will be argued and decided, upon the bill and the plea, just as in case of demurrer it is upon the bill and demurrer.

On the hearing of a plea, the court usually pro-

nounces one of the four following orders : that the plea be allowed ; that the benefit of it be saved to the hearing ; that it be allowed to stand for an answer, with or without liberty to except ; or that it be overruled. In the first case, when the plea is ruled sufficient in law, the plaintiff must either, by undertaking to reply, dispute the truth of the plea, or he must submit to have his bill dismissed with costs, unless the court give special leave to amend. In the second case, the court thinks that so far as appears, the plea may be a defense, but that there may be matter disclosed in evidence which would avoid it, supposing it strictly true, which question the court will not preclude. The plea will be allowed to stand for an answer, whenever the court thinks that, though the matter disclosed may be a good defense, yet it is not properly brought forward by way of plea, as where it does not fulfill the condition of being a short statement of fact ; as in the case of *Bayley v. Adams*, noticed in our dissertation on pleading, prefixed to this volume, where Lord Eldon allowed the plea to stand for an answer, with liberty to except. Such defense, consisting of several circumstances, is not a plea, but a defective answer, liable to exception, and must be so considered by the court, and cannot excuse the defendant from giving the discovery sought, and which can be enforced by excepting to the sufficiency of the answer. Where the plea is overruled, the defendant must put in his answer.

Other orders are sometimes made on the hearing of a plea. Leave, for instance, may be given to amend the plea, or to plead *de novo*.

Disclaimer is the next form of defense to be considered in reference to practice in equity. By disclaimer, as we have shown in treating of pleading, the

defendant alleges that he has not any right or title, legal or equitable, and that he does not, and never did claim title to the subject-matter of the suit. A defendant will not be allowed, by disclaiming, to avoid giving to the plaintiff any discovery which he may require. If a defendant, being entitled by his relation to the subject of the suit, to disclaim, and does disclaim, without being guilty of any misconduct, the defendant usually pays his costs and obtains the dismissal of the bill against him. Sometimes he is allowed costs.

The great end aimed at by the plaintiff in a suit by bill in equity, is to constrain the defendant to answer the bill, and thereby make discovery. The defendant may, along with the discovery, state in his answer any facts which he intends to use at the hearing. If the defendant be not required by the bill to answer on oath, and he answers accordingly, his answer will be a mere traverse of the case made by the bill. If the defendant thinks that the bill is demurrable, although he did not choose to take the objection in that form, he may claim, by answer, the same benefit as if he had demurred to the bill; and if, on the whole, he thinks no decree ought to be given against him, he submits that the bill ought to be dismissed as against him with costs.

At the foot of the main body of the answer is the signature of the solicitor, and after that, if any, the schedules or statements of accounts, or lists of documents, or other such matters which could not be conveniently introduced into the body of the answer, but are merely referred to. Sometimes the practice is merely to label such papers as exhibits A, B, and so forth, so as to distinguish them, and refer in the answer to them by such labels, and pray that they be consid-

ered as parts of the bill. At the end of the schedules comes the signature of the defendant and the attestation of the fact that the defendant has sworn to the truth of the answer. And where the papers are referred to as exhibits, and made part of the bill, the attestation or jurat follows immediately after the signatures, at the foot of the main body of the answer, of the solicitor and the defendant. The jurat should always express the circumstances and the character in which the person acts who administers the oath. The oath is not an absolute assertion of the truth of all the statements contained in the answer, but of the truth of those statements only of which the defendant is personally cognizant, and of his belief of the rest. This form of the oath, part being only of belief, is important with reference to the expediency of filing a replication.

Any erasure or interlineation in the jurat, is prejudicial, and it is better to rewrite the whole than to make any alteration. And any alteration of the answer, after it has been sworn, would be fatal; and therefore, any alteration in any part of the answer, which may have been made before the swearing, should be authenticated by the initials of the person who takes the jurat.

The court of equity has always exercised a jurisdiction, unknown to courts of common law, by enforcing a discovery, on oath of the defendant, of the truth of the matters in question set forth in the bill. By the regular and most formal course of practice, interrogatories are included in the bill, forming what, as we have seen, is called the interrogating part of it; and the first clause of the prayer of the bill is always, that the defendant might answer the premises on his

corporal oath. And in his answer, the defendant was constrained to answer, on oath, the questions put to him by the plaintiff in the bill. By the practice of the United States courts, the interrogatories are written at the foot of the bill, with a note stating, when there are more than one defendant, by which of them the several interrogatories are to be answered, as will be seen by the Rules, in Appendix to this volume.

By the practice in some courts of equity, the interrogatories are a separate document from the bill, and are drawn and signed by counsel in the same manner as the bill, and generally follow the bill, paragraph by paragraph, and contain the same statements amplified and put into an interrogative form. To these interrogatories, the defendant must put in a sworn answer, giving either an admission or a denial of the truth of the statements in the bill, or a statement that the defendant is ignorant on the subject inquired after. Where the defendant, after replication to a plea, fails to prove the truth of it, he may be compelled to make the discovery required, by way of answer to interrogatories filed by the complainant for that purpose.

The interrogatories must state the court, and the names of the parties to the suit, and then after such titling must follow a heading that the document is interrogatories for the examination of the above-named defendant in answer to the bill of complaint of the above-named plaintiff.

It is always optional with the plaintiff, whether he file any interrogatories at all, and he does not when he does not require any discovery from the defendants, or any of them. The defendant must be served with notice of the interrogatories.

The defendant may require discovery from the

plaintiff. To obtain this, the defendant was, by the old and regular practice, required to file what was called a cross-bill against the plaintiff, who, by his answer to it, gave the required discovery. By modern practice, the defendant can file interrogatories against the plaintiff, just as the plaintiff can against him. This can be done any time after the defendant has put in a sufficient answer, but not before.

The interrogatories are preceded by a concise statement of the subjects on which discovery is sought, and must be confined to matters stated in the defendant's answer; as he cannot use facts which do not appear in his answer, and therefore, can neither have, nor need discovery on any other matters.

When the defendant requires relief as well as discovery against the plaintiff, in respect of the matters involved in the original suit, he must bring a cross-suit and carry it on in the regular course.

If the plaintiff do not make full discovery to the interrogatories of the defendant, he can compel him to do so, as the defendant is compelled to do to the plaintiff's interrogatories.

## SECTION II.

### *The plaintiff's proceedings after answer.*

Bills were, formerly, frequently filed merely for the purpose of obtaining a discovery in aid of an action at law between the same parties. Such bills were called bills of discovery, discovery being their sole object. As soon as a sufficient answer was put in, the object of the suit was obtained, and the defendant was entitled

to his costs. Such bills have now, in a great measure, become unnecessary, as in almost all, if not all, courts of law, the parties may, by statutory enactment, interrogate each other, and the law court will enforce the required discovery in the law case without aid of equity.

In a bill for relief, discovery is only in aid of the relief which is to be obtained by a decree. Therefore, after the answer of the defendant has been put in, the first question for the consideration of the plaintiff is, whether the answer is sufficient; that is, whether the interrogatories have been fairly and fully answered. If they have not, the plaintiff should *except* to it for insufficiency. If the answer be sufficient, then the question arises, whether the plaintiff should introduce into his bill any new matter which occurs to him, by way of confession and avoidance of any part of the defendant's case. Such new matter, if any, must be introduced by *amendment*. If the answer be sufficient, and there be no new matter which can be advantageously introduced, it remains to the plaintiff to take the judgment of the court on the truth and effect of the matters stated in the bill and answer. If the plaintiff is content to rest his case on so much of the bill as is admitted to be true by the answer, and also to admit the truth of all the statements of the answer, he may set down the cause to be heard on *bill and answer*. If the plaintiff think it expedient to deny the truth of the answer, he does so so by a *replication*, which is equivalent to traversing the defendant's case.

#### *Exceptions to the defendant's answer.*

The mode by which the plaintiff objects, that the answer does not give full answers to the interroga-

tories, is, as has already been stated, by excepting to it. The exceptions are prepared and signed by counsel, and filed in the cause. Notice of the filing must be given to the defendant within the time prescribed by the rules of the court.

If the answer be insufficient in the points excepted to, in the opinion of the defendant's counsel, the defendant must submit, and put in a further answer; and notice of such submission must be served on the plaintiff. If the defendant's counsel thinks that the answer is sufficient, the defendant need do nothing until the plaintiff has taken his next step.

If the defendant does not, within the proper time, serve notice of submission, the plaintiff must have the exceptions set down for hearing, and obtain the judgment of the court upon their validity. Notice that the exceptions have been set down should be immediately served on the defendant. And, as in the case of demurrers and pleas, the court will usually hear the exceptions at an early day, in order to prevent the defendant from evading the putting in a full answer. The judgment of the court is, either that the exceptions be overruled, and that generally with costs; or that they be allowed, in which case a time is fixed for the defendant to put in a further answer; and it must be put in accordingly.

The further answer must contain such matter as, in conjunction with the first answer, will give full answers to the interrogatories which were the subject of the exceptions; and must be drawn, sworn, and filed in the same manner as the first answer; and may be excepted to in like manner for insufficiency; and the exceptions must be set down for hearing as were the first exceptions. And if these exceptions be allowed, the



court, to prevent the putting in an endless succession of insufficient answers, will order the defendant to be examined on interrogatories, and to be committed to prison until he shall have fully answered. An attachment may issue to compel the answer.

If the exceptions are overruled at the hearing, the plaintiff must proceed with his case on the answer that has been put in.

The plaintiff sometimes, in his bill, waives the oath to the defendant's answer; and the question has arisen, whether the plaintiff can except to such unsworn answer. The question is an open one, as both writers on equity and equity practitioners differ in opinion upon the question, and the courts have not settled it. Upon the principle which distinguishes evidence from defense in equity pleading, such unsworn answer is only a pleading by way of traverse, and contains no element of discovery; which must always be upon oath. Discovery is waived by waiver of the oath. The admissions in the answer can be used by the plaintiff, as limiting the points on which evidence is required, but not be used as evidence. They are only matter of pleading.\*

Though exceptions may be taken to an answer for scandalous or impertinent matter, the chief use of exceptions is for insufficiency in not making full discovery. When, therefore, by waiver of the oath, the answer is reduced to a mere traverse of the plaintiff's bill, and contains no discovery which is evidence in the cause, it cannot, without contradicting its character

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\* In a traverse at common law, all material allegations not traversed are admitted. Such admissions are not evidence, but only limitations, by a rule of pleading, of the matters to be proved. The express admissions in equity pleading are of precisely the same character.

as a mere traverse, be excepted to for insufficiency in not making full discovery. But it may, without inconsistency, be excepted to for impertinent or scandalous matter.

*Amendment of the bill and answer.*

It sometimes becomes necessary to amend the bill because of some mistake or oversight, and to bring it to the form in which it would have been drawn but for such mistake or oversight. And sometimes a bill must be amended by introducing statements altogether new, because of the case made by the defendant by plea or answer, or because of events which have occurred since filing the bill. The subject of amendment of the bill has already been considered in treating of pleas. It is again noticed here because the most important amendments are generally those introduced after answer.

The amendments may be made in any part of the bill, in the parties, in the body, or in the prayer; the only limitation being that they must not change the nature of the suit. They may be made either by striking out parts of the bill, or by the insertion of new passages. The most regular form is to file a bill which recites the substance of the original bill, and of the other proceedings necessary as an introduction to the subject of the amendment. The amendment is then stated at large, and the prayer is, that the defendant may answer the amendment; or if the original bill remains unanswered, the prayer is that the defendant shall answer the original and amended bills. The defendant may demur, plead, or answer, to the matter of the amendment; and like process may be used to compel an answer as in the case of an original bill. When the bill is amended by striking out parts of it, or by

inserting new matter, it will be as amended, in all respects similar to an original bill, but should have a second signature of counsel. If the defendant has answered the original bill, he cannot answer it again in answering the amendment. Amendments may be made at any stage of the cause, so that the case shall be decided upon its merits. An order of the court for leave to amend is necessary before the amendments can be made. Defendants introduced into the suit by amendment must answer the whole bill. The time for answering an amendment is usually named in the order of the court granting the leave. Otherwise, it is regulated by the rules of the court.

Leave is sometimes given to amend an answer, or more commonly to file a supplemental answer, to supply the defects of that originally filed. But to obtain such leave, the defendant must file a petition verified by his affidavit, stating the nature of the proposed alteration, and also the circumstances which occasioned the defect or error in the original answer. The same strictness is required where a plaintiff applies for leave to amend a bill for an injunction. The time within which the amendment is to be made is usually named in the order of the court granting the leave.

### *Hearing on bill and answer.*

When a sufficient answer has been put in to the bill, the pleadings contain all the facts on which the judgment of the court is to be given. The mode of obtaining this judgment will vary, according to the extent to which the plaintiff is ready to admit the truth of the answer. He may set down the cause for hearing on bill and answer, in which case he admits the truth

of the whole answer. This is hazardous except in a clear case.

### *Replication.*

If the plaintiff denies any allegation in the answer, or requires proof to sustain any charge in the bill, which has not been admitted by the answer, he should enter a replication to the answer, which puts in issue every question of fact, as well as of law. As the answer of an infant, by his guardian, does not bind the infant, the plaintiff must reply to the answer of an infant defendant. The replication may be general or special. In most cases the general replication will be sufficient. On filing a replication, regular practice requires to sue out a subpoena against the defendant, to rejoin. But by a less strict practice, the cause is considered to be at issue by the mere docket entry of a replication.

### *Interlocutory proceedings.*

During the progress of a suit in equity, it often becomes necessary for the purposes of the suit, to obtain from the court interlocutory orders—that is, orders not made at the hearing of the cause—in relation to incidental matters auxiliary to the suit. The answer of the defendant is the chief foundation of these orders. It is proper, therefore, to consider such orders at this stage of our inquiry.

These interlocutory proceedings are conducted by established forms, as binding on the court as those by which the main proceedings are carried on. It was in reference to an interlocutory proceeding, that Lord Chancellor Erskine said (13 Ves. 397), “The forms of the court are ancient forms which the wisdom of ages

has established, and by which I am bound." It is therefore important to call attention to the forms of interlocutory proceedings.

They are begun by motion or petition. A motion is an application *viva voce*, by counsel, for an order of the court. A petition is an application, by the party, in writing, for an order, stating the circumstances on which the application is founded. There is no technical distinction between a motion and a petition. The same object is aimed at by both. But, as the facts upon which they are founded, must appear on the face of the proceedings, a motion is proper only where the circumstances are few and simple and already appear in the proceedings. When new matter is to be introduced, or when the application rests upon facts to be collected from different parts of the proceedings, a petition, reciting the new matter, or facts from different parts of the proceedings, is usually filed. And when the petition states new matter, it should be sustained by an affidavit or documentary evidence. The statements in the answer of the defendant filed in the cause, have generally considerable influence on the application, whether by petition or motion, and in some instances they are the only admissible evidence. Where other evidence is admissible, it is brought forward, not by the regular examination of witnesses, as in the regular course of the suit, but by the affidavits of voluntary deponents. A motion must be made in open court. A petition may be filed at any time.

Motions and petitions are divided into two classes:

1. Motions and petitions of course, or such as seek an order which, by the practice of the court, may be granted on asking, without hearing both sides; and
2. Special motions or petitions, or those which can only

be granted for cause shown. Where the application is of the latter kind, it will not be granted *ex parte*, except in cases of emergency, and then notice of the motion, or a copy of the petition must be previously served on all parties interested.

Where the motion or petition is not of course, and may be resisted, the court usually passes an order granting the application, unless cause be shown to the contrary by the adverse party, on or before a certain specified day. In some cases, the order directs that the matter of the motion or petition be heard on a certain specified day. The opposite party is entitled to notice of such motion or petition.

On the day for showing cause, the adverse party may appear and object to the order as improper, upon the grounds on which the application is founded. Where the application is by petition, the adverse party may file an answer denying the facts stated in the petition, or setting up other facts in avoidance. This answer should be supported by affidavit. If the parties are at issue as to facts, according to the more regular and formal practice, a commission may issue to examine witnesses, or the witnesses may be examined by an examiner, as in the regular course of the suit. But a more summary practice has obtained, under an order of court allowing depositions to be taken before a justice of the peace or other like public functionary. The order always requires a certain number of days' notice of the time and place for taking the depositions to be given to the opposite party. Proof of this notice should be returned with the depositions, and it should also appear that the depositions were taken pursuant to the notice. When an answer is filed, it is treated as an answer is to a bill in the ordinary course

of the court, possessing the double function of a pleading and evidence, and has the same weight as evidence. The petition, answer and depositions are heard together.

If no cause is shown, the motion for an absolute order must be made at such time as is prescribed by the rules of the court. Either party is at liberty to call up the motion on the day appointed; if not called up then, it may be called up or submitted on some subsequent day.

The judicial judgment, passed upon a motion or petition, is called an order, as distinguished from the sentence of the court, delivered on the hearing of the cause, when all the rights involved in the suit are finally settled upon the pleadings and evidence presented by all the parties, which is called a decree. Every formal expression of the judicial will of the court, is either an order or a decree. We will first treat of orders and their purposes; and afterwards, of the form, nature and consequences of a decree.

Orders are made both before and after the decree. We will now consider those made before the decree, and treat hereafter of those made after the decree.

Equity procedure has grown up out of the peculiarity of the causes which are prosecuted by a suit in equity. It frequently happens that the relief given by a court of equity, would be entirely useless if the plaintiff did not get it before the hearing. It is sometimes required immediately, and even where this is not the case, important questions not unfrequently arise in such a form that they cannot be well determined on the hearing or on further proceedings. Such questions are brought before the court by either motion or petition; by motion when the pleadings

themselves sufficiently indicate the point to be decided; and by petition, as we have already shown, when it is necessary to have a written statement of the grounds of the application.

The objects of interlocutory orders are numerous. They include, for instance, the issuing of attachments or other process of the court, the taking of bills *pro confesso*, the compelling of the plaintiff to elect whether he will sue at law or in equity, the dismissal of bills for want of prosecution, and the taking of any other steps to remedy delay or irregularity in a suit. We pass by the consideration of orders of this class, as it would turn for the most part on technical rules of practice, unsuited to the purpose of this succinct treatise. The only objects of interlocutory orders which seem necessary to be noticed for our purpose, are, 1. The production of documents; 2. The payment of money into court; 3. The appointment of a receiver; 4. The grant of an injunction; and 5. A writ of *ne exeat regno*.

1. The defendant is bound, if required by the plaintiff, to set forth in his answer a list of all documents in his possession which can furnish evidence in regard to the matters in question. The production of these documents is necessary to the completion of the defendant's answer. The discovery obtained from the answer itself, is not all to which the plaintiff is entitled. It gives him a statement by the defendant on oath, as to all facts to which he is interrogated, and also a list or schedule of all documents within the defendant's power, relating to the subject-matter of the suit. But the documents still remain to be examined, and the information which they contain is frequently the most important part of the



discovery. For the purpose of obtaining such examination, the plaintiff is entitled, either before or after the sufficiency of the answer has been determined, and without prejudicing any question on that point, or at any subsequent period of the cause, to move that the defendant may produce, and that the plaintiff may have liberty to inspect and take copies of all the documents scheduled in the answer, and that they may be produced before the examiner and at the hearing of the cause. Upon this application an order will be made that the documents be deposited with the proper officer of the court, or, if a special reason be shown, as that they are in constant use in the defendant's business, then in the defendant's own office. The right to the production of documents belongs to the plaintiff only, but a defendant may occasionally be permitted, on special grounds, to delay his answer until some document material for making out his defense has been produced by the plaintiff.

2. Payment of money into court is ordered where the defendant admits that he has the fund in his hands, or that he once had it, and has not legitimately disposed of it, which he does not claim as his own, and in which he admits that the applicant is interested. The general rule is, that the order shall not be made until the answer is put in, and that it must be sustained entirely on the admissions made. The reason of this rule is, that the motion is made before witnesses can be regularly examined, and therefore the defendant may fairly claim that either his answer shall be taken as true or that the adjudication shall be delayed until he has an opportunity of proof. In a case of gross misconduct, where the plaintiff has made affidavit of the facts, an order may

be made before answer, on admissions in the defendant's counter affidavit. (6 Ves. 738.) If the admissions in the answer do not warrant the application, it may be made at the hearing on the evidence in the cause, or may be made between the original hearing and the hearing on further directions, either on admission in the examination of an acting party, or on the master's report. (19 Ves. 116; 6 Madd. 114.) The order cannot be made on motion after decree, and before hearing on further directions, merely on admissions in the answers. (7 Hare, 288; 13 Beav. 107.)

The principle on which the order is based is, that the fund of which payment into court is asked, is a fund held by the defendant in trust.

The order is strictly one of precaution. The fund is brought into court, that it may be preserved until the decree, and not that an earlier decision of the cause may be made, and will be retained untouched until the hearing of the cause. The order is obtained by motion made on notice, that the defendant may be ordered on or before a specific day to pay the amount into court.

The first order is usually conditional, that the defendant pay the money into court, or show cause to the contrary, by a certain day; and on failure to show cause as required, a peremptory order may be obtained and enforced by attachment.

3. A receiver may be applied for on the filing of a bill; or at any other stage of the cause, on a petition supported by affidavit. If the case is urgent, the court will appoint a receiver immediately; and the adverse party, on filing his answer to the bill, or other application, may obtain an order for hearing a motion to discharge the receiver at a short day. But the more usual

course is for the complainant to obtain an order *nisi* requiring the defendant to show cause, by a certain day, why a receiver should not be appointed; and on his failure to show cause, a peremptory order is made.

A receiver is appointed where there is an estate or fund, but there is no competent person entitled to hold it; or that the person so entitled is in the nature of a trustee, and is misusing or misapplying the property. A receiver may be appointed in cases of partnership, where one of the partners, having got the business into his hands, is wasting or destroying the partnership, or is claiming to exclude his copartners from the concern. As all the partners have an equal right to the management, the court will exclude all for the protection of all, and will appoint a receiver to get in the assets and wind up the partnership; as the court will only interpose with a view to a dissolution, and not that the trade may be carried on. In any case where it is made to appear that the property in controversy is in danger, the court of equity will appoint a receiver. The appointment is made not for the benefit of the applicant only, but for the benefit of all parties interested.

On the hearing of the motion to appoint or to discharge the receiver, nothing is read but the bill or petition, and answer. If the defendant fails to put in his answer, on oath, all the allegations in the bill or petition are taken as true.

In particular cases, and where the application is by petition, the parties are permitted to collect testimony by affidavits taken after notice to all parties. But *ex parte* affidavits are never admitted.

4. Injunction is a prohibitory writ issued by the authority of a court of equity, to restrain one or more of the defendants or parties, or *quasi* parties, to a suit

or proceeding in equity, from doing, or from permitting his servants to do, an act which is deemed to be unjust or inequitable, so far as regards the rights of some other party or parties to such suit or proceedings in equity. In England, injunctions were divided into common and special. The common injunction was obtained of course, when the defendant in the suit in equity was in default for not entering his appearance, or for not putting in his answer to the complainant's bill, within the times prescribed by the practice of the court. Special injunctions were founded upon the oath of the complainant, or other evidence of the truth of the charges contained in the bill of complaint. They were obtained upon a special application to the court or to the officer of the court who was authorized to allow the issuing of such injunction, and usually upon notice of such application given to the party whose proceedings were sought to be enjoined. In the United States courts, and in the equity courts of most States of the Union, the English practice of granting the common injunction has been discontinued or superseded, either by statute or by rules of court; and in all the courts where such English practice is superseded, all injunctions are special, and are divided into preliminary or interlocutory, and final or perpetual injunctions.

Preliminary injunctions are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been definitely settled by the decision and decree of the court in such suit or proceeding.

Final or perpetual injunctions are awarded, or di-

rected to be issued, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court, or when the rights of the parties, so far as relates to the subject of the injunction, are finally adjudicated and disposed of by the decision and the order or decree of the court.

The writ may be granted by order of the court immediately upon the filing the bill, when it prays an injunction, which, for this purpose, must be verified by affidavit of the plaintiff; or of one of the plaintiffs where there are more than one; or by the affidavit of some third person, who shows why the plaintiff does not make affidavit, and especially how he happens to have a knowledge of the facts set forth in the bill; or by some other testimony sufficient to induce the court to credit the truth of the statements of the bill. The writ may also be obtained at any subsequent stage of the suit, on petition, which must be sworn to or verified as just stated.

The application for a preliminary injunction is always addressed to the sound discretion of the court, and may be refused or granted simply, or granted in a modified form, or upon certain prescribed conditions, and especially on the condition that the plaintiff give bond with security to indemnify the opposite party from the consequences of the injunction. The injunction is granted, usually, to continue until the filing of the defendant's answer, or until further order.

As soon as the defendant has put in a full answer, he may move to dissolve the injunction. And it is then a question for the discretion of the court, whether, on the facts disclosed by the answer, or as it is technically termed, on the equity confessed, the injunction shall be at once dissolved, or whether it shall be con-

tinued to the hearing. The general principle of decision is, that if the answer shows the existence of an equitable question, such question shall be preserved intact until the hearing.

It is an almost universal practice to dissolve the injunction where the answer fully denies all the circumstances upon which the equity of the bill is founded ; and likewise to refuse the writ, if application is made after the coming in of such answer. But there, nevertheless, is no inflexible rule with regard to dissolving an injunction on answer denying the allegations of the bill ; the granting and continuing an injunction must always rest in the sound discretion of the court, to be governed by the nature of the case.

If the injunction be applied for before the answer, it must necessarily be sustained on affidavit ; and the defendant may resist it on counter affidavits ; or if it has been obtained *ex parte*, he may move to dissolve it on counter affidavits, or may wait until he has filed his answer, and then move to dissolve. If the motion, either to grant or dissolve the injunction, is heard after answer, the admissibility of affidavits is a questionable point.

According to the regular practice in equity, the motion to dissolve is usually heard on bill and answer and the accompanying exhibits, and no other proofs are allowed to be read. But by statute in one or more of our States, on application of any of the parties, the court is authorized to order testimony to be taken on behalf of the parties in reference to the allegations in the bill, in such form as it may direct, and on such terms and under such regulations as to notice and otherwise as may be deemed equitable ; provided that such testimony be returned by the day when the mo-

tion for dissolving the injunction shall be heard; and such testimony, at the hearing of the motion, shall be considered in connection with the bill or petition and answers in the cause. And in England, by 15 & 16 Vic., the answer of the defendant is, for the purpose of evidence on the motion to dissolve, to be regarded merely as an affidavit, and affidavits may be received and read in opposition thereto.

In England, exceptions filed to the answer may be shown for cause against the dissolution; but the court will direct the exceptions to be set down and argued *instanter*. (7 Beav. 584.) In Maryland, exceptions may be heard at the hearing of the motion to dissolve, and if they are ruled good, the injunction will be continued; but without prejudice to the right of the defendant to renew his motion on filing a better answer. (1 Bland Chan. Rep. 181, 353; Ib. 191.) By the motion to dissolve, the defendant calls upon the plaintiff to show cause why, after having *well* and *sufficiently* answered the bill, the injunction should not be dissolved. Having thus put himself upon a sufficiency of his answer, at that time, and for that purpose, he is bound to sustain it in all respects; or he must fail in his motion; therefore, this practice is founded on a principle of pleading.

Where the motion is heard on the bill and answer, so much of the bill as is not denied by the answer is taken for true, and likewise so much of the answer as is responsive to the bill.

5. The writ of *ne exeat* is a writ to restrain a person from quitting the State without leave of the court. The writ may be obtained on the filing of the bill, supported by the affidavit of the complainant. It may likewise be obtained at any subsequent stage of the

cause, on petition supported in like manner by affidavit. The complainant's demand must be equitable, and for a money demand actually due at the time of the application of the writ; and the bill or petition must allege precisely the nature and amount of the claim, and that the defendant intends going abroad. The writ is issuable if the defendant is within the jurisdiction, although his domicile may be abroad, but not if the plaintiff be himself resident abroad.

The writ is directed to the sheriff, and requires him to take security from the defendant in a specified amount, that he will not leave the State without the order of the court. Upon the filing of his answer, the defendant may obtain an order for hearing a motion to discharge the writ, at a very short day; and the writ will be discharged, if, on the hearing, it appears that the answer fully denies the existence of the claim, or the intention to leave the State. In case the defendant refuses to give such security as required, the sheriff commits him to custody. The bond required resembles a bail bond at common law, and is in the nature of bail for the appearance of the defendant in court to abide the decree which may be rendered against him.

What effect the abolition of imprisonment for debt has upon the writ of *ne exeat*, is an unsettled question.

### *Evidence.*

The cause being at issue, the parties next proceed to examine their witnesses. This is done before commissioners or examiners, as has been already stated, upon written interrogatories. The parties or their attorneys are allowed to be present at the examination, and to have copies of each other's interrogatories. After witnesses are examined one side, the other side



can have an adjournment of the commission for the purpose of receiving additional interrogatories, proofs and witnesses, and giving each party a fair opportunity of adducing all his evidence. In some courts, instead of written interrogatories the witnesses are examined in chief, and then cross-examined, and re-examined *viva voce* by the respective parties or their attorneys, before commissioners, who take down their evidence not by question and answer, but in the form of a narrative, which is read over to the witness for his correction or explanation. And other modified practice has been introduced, which must be learned in the courts where used. The testimony, and the documentary proofs properly indorsed so as to identify each as mentioned by the witnesses, must be sealed close, and returned by the commissioners, with the commission and a certificate of its proper execution according to all the requirements of the commission, to the court from which the commission issued.

The evidence and proofs must be confined to the pleadings, which bind down the parties to certain definite statements of facts made by each of them, on which they rest their case, and of the facts of their adversary's case which they dispute. Neither party will be allowed at the hearing to controvert any facts which he has stated on the record, nor any facts put on record by the adversary, of which he has admitted the truth. At the hearing each party may make use of his adversary's pleadings, and of so much of his own as the adversary has admitted. Each party must prove all the facts essential to his case which he has stated and have not been admitted by the opposite party; and must contradict such statements of the opposite party as have not been admitted. Sometimes the bill

may be read by the plaintiff as evidence against the defendant, of his admission of the truth of the matters therein alleged, and not noticed in the answer; on the principle, that being required to admit or deny the truth of the allegations, he has by his silence admitted them. This rule is, however, confined to facts either directly within the knowledge of the defendant, or which may fairly be presumed to be so. If the matters omitted to be noticed are not of either of these descriptions, the omission in the answer is merely matter of exception on the part of the plaintiff for insufficiency, and if he replies, without excepting, he must prove his allegations, as not admitted. It was, however, said in *Young v. Grundy* (6 Cranch, 51), without any qualification whatever, that if the answer neither admits nor denies the allegations of the bill, they must be proved at the hearing; and many decisions of able courts maintain the same unqualified doctrine, making no distinction as to the matters omitted to be noticed.

Let us apply the rule above indicated to the two several modes in which causes are brought before the court with a view to a decree. First, on hearing on bill and answer, the plaintiff may read against each defendant any part of his answer; for it is the adversary's case; and he may read such parts of his bill as are admitted by the answer. All parts of the bill which the defendant by answer denies, or what is equivalent, professes ignorance of, cannot be proved at all; because the form of submitting the case for decree upon bill and answer does not admit of the production of evidence. Each defendant, in like manner, may read the whole bill, for it is his adversary's case, and also the whole of his answer; for where the cause is heard upon the bill, answer, and exhibits, the answer, not

being denied by a replication, is considered true throughout, in all its allegations, whether responsive or not, because the plaintiff, by not filing a replication and thereby putting the facts in issue, has deprived the defendant of the opportunity of proving them. And if, after a replication is filed, the cause is set down for a hearing on the bill and answer, by the plaintiff, or by consent, the answer is still taken as true, notwithstanding the replication.

We will now consider the rule above indicated in relation to the mode of bringing a cause before the court, with a view to a decree by replication. In considering an answer in relation to an issue made by a replication, it is all-important to distinguish between its function as a pleading and its function as evidence. A bill partakes of the character both of a pleading and also of an examination of the defendant as a witness. And the answer, so far as it sets up a new and distinct matter of defense to defeat the equity of the plaintiff, is a mere pleading in the nature of a confession and avoidance; but when it only denies the facts on which the plaintiff's equity is founded, it is a pleading coupled with evidence. So far as it is responsive to the bill, it is evidence; and as the plaintiff has made the defendant a witness, he is bound by his testimony, unless it is disproved; and he cannot urge against the weight of the answer, that it is the testimony of an interested party. It should be borne in mind, that, where an answer is, *in form, responsive* to an interrogatory in a bill, but also involves, affirmatively, the assertion of a right in opposition to the plaintiff's demand, it is but a pleading, and is not evidence of the truth of the right so asserted. The plaintiff can read the answer because it is his adversary's case, and also so much of

the bill as is admitted by the answer, in support of his case. And in reading the answer of the defendant against him, the plaintiff is not bound to read the whole answer, but may read only such parts as make against the defendant. The plaintiff can adduce evidence to prove the parts of the bill not admitted by the answer, and also to contradict the statements contained in the answer. And the defendant can adduce evidence in support of his answer, and generally in meeting or contradicting the evidence of the plaintiff.

It is important to state here, the true import of the rule in equity, that an *answer responsive to the allegations and charges made in a bill*, and which contains clear and positive denials of them, must prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness and attendant circumstances which supply the want of another witness, and thus destroys the statements of the answer, or demonstrate its incredibility, or insufficiency as evidence. It would, from the phraseology of the rule, seem, at first view, as if the testimony of *a witness* is indispensable, and that documentary evidence, however weighty, will not alone outweigh the answer. The rule, as stated, has reference to an answer opposed only by the testimony of one witness. In such case, the court will neither decree nor send it to a trial at law. But if the evidence in the cause, no matter what it may be, is sufficient to outweigh the answer, the plaintiff may have a decree in his favor.

We have, thus far, spoken of evidence taken by commissioners or examiners. In particular cases, courts of equity are in the habit, when any material question of fact cannot be safely decided upon the

evidence taken under a commission or before an examiner, to send the question to a jury, in order that their verdict may inform and satisfy the conscience of the court. This may be done, either by the court's ordering an action to be brought or by directing an issue. As an instance of the former, if a question arises whether a contract be usurious, and the facts are doubtful and disputed, the court has ordered an action to be brought on the contract. As an instance of the latter, where the due execution of a will is disputed, the court has directed an issue.

The court settles the form of the issue, either with or without a reference to a master, and directs who shall be plaintiff and who defendant, and when and where the trial shall be had ; and may also determine what matters shall be admitted as evidence. This authority is, of course, subject to any legislative regulations that may be made, or have been made. Correct practice requires that specific and distinct issues of fact should be submitted, that the conscience of the court may be advised by the special verdict responsive to the issues thus made.

When the form of the issue has been settled, the party who is to be plaintiff brings a feigned action against the party who is to be defendant, wherein he declares that he laid a wager of five pounds with the defendant, on the questions presented by the issue, and avers that the fact is as he contended it was, and therefore he brings his suit for the five pounds. The defendant, admitting the wager by his plea, denies that the fact is as was alleged by the plaintiff. The issue is thereupon joined, and is tried in the usual way. In modern practice, the form of proceeding is more

simple. Both forms of proceeding are given in Part IV. of this treatise.

The trial is conducted in the usual way, except so far as may be otherwise directed by the order awarding the issue. When the verdict is found, it is certified by the court of law into the court of equity, together with the various questions of law which may have been discussed in the progress of the trial, with the evidence out of which they arose; and it is usual to state whether the court is satisfied with the verdict, or not.

The regular time for directing an issue is at the hearing of the cause. In a special case, however, the issue may be directed by an interlocutory order before hearing.

Upon the return of this certificate, the party against whom the issue is found may apply for a new trial, setting out in his petition the grounds on which it is asked. A new trial will be granted by the court of equity, whenever it is dissatisfied with the verdict, either because of the misdirection of the judge, or because it was against evidence, or where new evidence is discovered; and sometimes because of the importance of the subject in controversy. The issue may be remanded to the same court of law or to another. The form of the issue may be changed and new conditions of trial prescribed.

The party in whose favor the issue has been found, may, by petition, have the cause set down on the equity reserved, or for further directions, on which an order passes for hearing the cause at a particular day. As the issue is directed solely "for the purpose of informing the conscience of the court," the verdict is not conclusive or binding on the court, nor even a suc-

cession of concurring verdicts; but the court can treat the verdict as a mere nullity, and decide against it. The decree or order directing the issue reserves all equities; the cause, therefore, upon the coming in of the certificate of the court of law, stands as an original cause, and a formal decree passes upon and settles all rights.

It is, according to the ancient authority of a court of equity, in its discretion to award or refuse an issue, except where an heir at law controverts the validity of a will of lands. In such case, the heir has a right to demand a trial by jury; and it would seem that a court of equity would, like a court of law, be bound by the verdict. In several of the individual States, the trial of facts in cases in equity is secured to the parties by constitutional or statute law, as a matter of right. The law, in granting such right to parties, takes away from the court of equity, where such right is asserted, the authority to determine any question of fact material to the decision, and refers it exclusively to the jury, the court retaining only the power to apply the law of equity to the facts found by the jury, in the same manner and to the same extent as at common law. And in the States where the right of trial by jury in equity causes is secured by the Constitution, and the issues do not grow out of the pleadings, as in suits at law, but are framed by the court, in framing the issues, the court will allow the parties to submit to a jury all such material facts as are proper to be decided by them; and when a verdict is rendered, and not set aside for good cause shown, it will be considered as settling the facts conclusively. The provision of the Federal Constitution, "No fact once tried by a jury shall be otherwise re-examined in any court of the United

States than according to the rules of the common law," makes the verdict of the jury conclusive upon the parties and upon the court, whether the verdict be rendered upon a feigned issue sent out of equity to a court of law, or upon an issue framed upon a bill in equity in a court having jurisdiction both in equity and at common law, or in a civil suit at common law, subject however to be set aside for some cause known in the rules granting new trials at common law. So that in all the federal courts of equity, and in many of those of individual States, the verdict of a jury is as conclusive in a court of equity as in a court of law.

When an important and difficult question of law arises in a suit in equity, a case may, if the court think proper, be stated and sent to a court of law, for its opinion upon it. But the opinion is not conclusive on the court of equity. When after a hearing of the merits of a cause, a case is ordered to be stated, the cause is laid over ; and on the return of the certificate of the court of law, the court of equity may decide forthwith, or order a reargument. This practice is obsolete where the same judges administer law and equity.

A commission may be obtained at any time after the filing of the bill, to examine witnesses *de bene esse*, where the witness is ill, or very infirm, or is going abroad, or is the only witness to prove the case, or a material part of it. The application must be sustained by the affidavit of the party ; and the examination is taken, to be read only in case the witness is not in a condition to be examined at the regular period for examining witnesses. The plaintiff may obtain a commission to examine *de bene esse*, at any



time after serving the defendant with a subpoena. But a defendant cannot obtain such a commission, nor can he regularly examine under the plaintiff's commission, until after he files his answer. Notice of the execution of the commission must be given to all parties, who are at liberty to appear, as at the execution of all other commissions. It was the English practice to make the application by bill for such commission; but the modern practice is to make it by petition, stating the circumstances, after filing the bill.

Upon the return of any commission to the proper officer of the court, the seals may be broken, and the depositions opened for inspection, called publication; and if, upon examination, either party finds his proofs defective, he may move for a new commission to take any testimony which is relevant to the cause. But the reasonableness of the application, and of the nature of the testimony wanted, and why it was not procured before, must be proved by affidavit; and usually the condition is imposed that the hearing of the cause shall not be delayed. All objections to the testimony, apparent on the record, may be made, and are usually made at the hearing of the cause.

*Hearing the cause, and signing and enrolling the decree.*

A book or docket of causes to be heard is made out at the commencement of the term, for inspection; and the suits set down for hearing will, on application, be taken up and decided in the order in which they stand, unless postponed by consent or the order of the court; and a day may, in like manner, be fixed for the hearing of any cause or motion.

We have already shown that there are two several modes in which causes are brought before the court with a view to a decree. The first is, hearing on bill and answer; and we showed that the court is confined to considerations based on the bill and answer for the foundation of the decree. The second is, by replication; and we showed how far the pleadings furnish considerations as a foundation for the decree; but that the testimony of witnesses, and sometimes the verdict of a jury, and documentary proofs, are the chief considerations for the court when the cause is brought before it for a decree by replication; and that such testimony and verdict and proofs are filed in the cause, making a part of the record.

The cause may be argued *ore tenus*, or submitted on notes. When the cause is argued orally, the counsel for the plaintiff opens the pleadings and evidence, and the points arising thereon; the counsel for the defendant succeeds, and the counsel for the plaintiff concludes. If the cause is submitted without oral argument, each party ought to submit to the court an abstract of the case, with short notes of his argument.

In cases of difficulty, the decree is sometimes drawn by the chancellor or judge in equity. But in ordinary cases it is expected that the solicitor for the complainant, guided by the opinion of the court as expressed at the hearing, will furnish the draft of the decree. The decree is signed by the chancellor or judge in equity, and filed by the register of the court. By the English practice, the decree must then be enrolled, in order to become a record of the court. The party wishing to enroll makes a copy of the decree, preceded by a statement of the prayer of the bill, and some other details.

This copy is termed the docquet, and is left with the record and writ clerk, together with the original decree. He compares them, and if he finds the docquet correct, he procures the signature of the lord chancellor to it, and then copies the docquet and signature on parchment rolls. The docquet and engrossment are reserved in the office, as evidence of the enrollment. In Maryland, a decree is to be taken and considered as enrolled when it is signed by the chancellor or judge in equity, and filed by the register, and the term during which it was passed has expired. And it is probable that no such proceeding as the English mode of enrollment is used in the equity courts of any of our States. And in the United States equity courts, decrees are deemed to be recorded as of the term of the court in which they are passed, though not then actually spread upon the record, and in effect are considered as enrolled of that term. And as decrees in all the courts of equity in this country are matters of record, and are deemed to be recorded as of the term of the court in which they are passed, they must in effect be also deemed as enrolled, which is only another term for recorded.

### *The decree.*

Decrees are interlocutory or final. It seldom happens that the first decree is final. Sometimes long accounts are to be settled, incumbrances and debts inquired into, and other facts, either not stated in the pleadings, or so imperfectly ascertained by them that the court is unable to determine finally between the parties. Therefore a reference by an interlocutory decree, for inquiry before a master or auditor, or a

trial of facts before a jury, or some other proceeding becomes necessary to inform the conscience of the court. A decree is final when all the circumstances and facts material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained by the pleadings on both sides, that the court is enabled from thence to collect the respective merits of the cases of the parties litigant, and to determine fully and finally between them.

The distinction between interlocutory and final decrees is very obvious in their definitions; but in its application to particular cases, it has always and still does create difficulties in practice, some courts deciding a decree to be interlocutory, where others decide a decree precisely like it, in an identical case, to be final. We must, therefore, in a brief consideration like this, rest in the definitions, and leave the student, in doubtful cases, to the decisions of courts where the special difficulties have been considered. Perhaps no exact boundary line is possible between the two kinds of decrees, in the varying circumstances of cases arising in practice, so as to insure unanimity of judicial decision. And the difficulty of applying the distinction in doubtful instances can produce but little, if any, inconvenience in practice.

The difference between an interlocutory and a final decree may be illustrated by the difference between an interlocutory and a final judgment at law. If an action at law is brought for damages only, and the issue is an issue at law, or an issue of fact not tried by a jury, the judgment is only that the plaintiff *ought* to recover his damages, without specifying *the amount*. For as there has been no trial by jury in the case, *the amount* of

damages is not ascertained. The judgment is therefore *interlocutory*. A writ of inquiry by a jury to assess the damages then issues; and upon the return of the inquisition or verdict assessing the *amount of damages*, the plaintiff is entitled to another judgment, *that he recover the amount of damages so assessed*. This is a final judgment.

Decrees are, in their regular form, divisible into four parts. These are, 1. The title of the cause, and the date; 2. The proceedings in which the decree is made, and the grounds on which it is founded; 3. The declaration of right; 4. The ordering part. By the practice of the United States courts of equity, prescribed by rules ordered by the Supreme Court, the second part of the decree is omitted. (See Rule 86, in Appendix to this volume.)

The declaration of right does not always occur in a decree. Its most frequent occurrence is where the court declares what is the true construction of written instruments, and particularly of wills. The ordering part, which occurs after the declaration of right, if any, is itself occasionally omitted when the decree is merely declaratory. The ordering part directs the doing such such acts as are necessary to give the plaintiff such relief as he is entitled have on that particular occasion, such as the payment of money, or the execution of deeds, or the like.

## PART III.

## COURSE OF A SUIT AFTER DECREE, AND INCIDENTAL PROCEEDINGS.

We have traced the regular steps by which a final decree is obtained by a plaintiff against a defendant. In some cases this decree may put a complete end to the suit ; as where a bill is dismissed without costs, or where a merely declaratory decree has been sought. But this can rarely happen ; for there will generally be some costs to be paid by one party to another, even if nothing more remained to be done. And in a large proportion of cases various proceedings are necessary under the decree to the substantial success of the suit.

We will here offer some considerations on interlocutory decrees, strictly so called, which refer the case to a master in chancery, or to an auditor, to inquire into the matters referred, and to digest the materials and report his proceedings to the court for a final decree.

The court may refer the cause generally, and on the return of the report determine such questions as may be contested by the parties. Or it may, in the first instance, decide any principle which the facts already before the court may suggest, or all the principles on which the purpose of the reference is founded. The propriety of the one course or the other depends on the nature of the case, and is within the discretion of the court.

Where the interlocutory decree establishes the principles on which the report is to be based, then the controversy turns exclusively on the question of their correct application by the master or auditor in his report.

And the court determines the question either by setting aside the report, or by confirming it by a final decree.

As the United States Circuit Courts exercise equity jurisdiction sitting in the different States, and their procedure is the procedure, in substance, common to the courts of equity of the several States; and it is desirable that all courts of equity should have a uniform practice, we will refer, as a guide in proceedings before masters, and as to exceptions to their reports, to the rules prescribed by the Supreme Court of the United States, contained in the Appendix to this volume. These rules, together with the various forms in Part IV. of this treatise will satisfy every need in equity practice in proceedings before masters in chancery under interlocutory decrees of reference. And the proceedings under a reference to an auditor are similar to those before a master.

An interlocutory decree for an account refers the cause to a master in chancery or an auditor, with directions to take the account from the evidence in the cause, and such other evidence as may be produced before him, by any of the parties, on giving them notice. After a decree for an account, all the parties become actors; and any party may require the master or auditor to proceed. The evidence offered must be of the same kind as would be required to sustain like points on the final hearing. The plaintiff may read the answer, or any portion thereof, to sustain a charge against a defendant. But the answer cannot be read by the defendant in proof of a discharge set up by him, unless the allegation relative thereto is strictly responsive to the bill, or unless the matters of charge and discharge are alleged to be parts of one transaction; as

when the answer states that on a particular day the defendant received a sum of money and paid it over.

By the old English practice the master does not state the evidence in detail, but only draws and reports his conclusions. But in some of the United States, the master or auditor reports all the depositions laid before him, together with his conclusions upon the law and evidence, and an account stated in conformity with his views of the equity of the whole case. The practice of the United States Courts in this respect is regulated by Rule 76 in the Appendix to this volume. The examination may be either upon written interrogatories, which is the more regular mode, or *viva voce*, according to the particular practice of the court.

By the old English practice the creditors who come in after the institution of the suit, do so by bill or petition, concisely stating the nature of his claim, and praying to be admitted as a coplaintiff accordingly. But a practice less formal and strict has grown up in some of the courts of this country, allowing a creditor to come in and participate by merely filing the voucher of his claim with the register of the court. The creditors or claimants coming in under the decree become parties thereto, and in case of delay on the part of the suing creditor, may claim the right to conduct the suit.

As soon as the master's or auditor's report has been filed, the next step is its confirmation by the court. The regular mode of confirmation is by an order *nisi*, made on a motion of course, directing that the report shall stand confirmed, unless the defendant shall, within ——— days after notice, show good cause to the contrary. If no cause is shown within the time specified in the order *nisi*, a further order is made on motion, confirming the report absolutely.



If any of the parties interested are dissatisfied with the report, they may file exceptions after service of the order *nisi*, and show them as cause against its being made absolute.

The practice in regard to exceptions to the master's report, in the United States courts, is regulated by Rules 83 and 84 in the Appendix to this volume.

The exceptions which, like the pleadings and interrogatories, require the signature of counsel, are a written enumeration of the alleged errors, and of the corrections proposed; and they should be so framed as not merely to allege error in general terms, but to enable the court to decide distinctly on each point in dispute. If, however, there be error apparent on the report, as, for example, if the facts stated contradict the conclusion, it is unnecessary to except. And if the master disregards the instructions and directions of the court, or where he does not furnish the facts necessary to enable the court to make a decree, the report will be set aside, though no exceptions have been filed.

The next step after filing exceptions is, that they should be heard and determined by the court, and in doing this there are three courses open for adoption:

1. They may be disallowed, or allowed absolutely, which has the effect of at once confirming the report as it stands, or with such changes as the allowance of the exceptions may make.

2. If the facts are imperfectly stated in the report, so that no judgment can be formed as to the proper conclusion; or if the existing evidence is unsatisfactory, but it is possible that other evidence exists which, in consequence of a favorable finding, has not been

adduced ; or if the nature of the matter contested, or the frame of the exceptions is such that their allowance shows a necessity for further investigation, it may be referred back to the master to review his report, continuing in the mean time the reservation of further directions, and either allowing the exceptions, or making no order thereon. On a reference back to review, the master may receive additional evidence ; but if it be accompanied by an allowance of the exception, he can come to no conclusion inconsistent with the terms of the exception. If no order is made on the exception, his finding on review is unfettered.

3. If the suit has taken such a course that, at the time of hearing the exceptions, it is apparent that whatever order be made, the same decree will follow, the court will decline to adjudicate on them, and may proceed to decree on further directions, as if no exceptions had been filed.

The plaintiff may, at his discretion, set down exceptions for hearing at the time he sets down the cause on further directions. But the propriety of so doing will depend on the probability of the exceptions requiring or not requiring a review of the report. For if there be a reference back to review, the cause cannot be heard on further directions, and the expense of setting it down will have been uselessly incurred.

When the exceptions have been disposed of and the report confirmed, the cause is heard on further directions, and this may be repeated from time to time, as often as further directions are reserved.

The decree on further directions is confined to carrying out the equities appearing on the report, consistently with the original decree. If circumstances

have occurred since the original decree which vary the form of relief required, but leave the substantial equity the same, they may be stated in a petition to be heard with the cause. But no order can be made on further directions which will vary or impugn the original decree, whether on a point which it had expressly decided, or one which, being raised by the pleadings, and not depending on the questions referred, has been unnoticed, and thus by implication disallowed. If the original decree is erroneous, the proper mode of correction is by a rehearing, a review, or an appeal.

A decree thus made without any reservation of further directions, constitutes a final decree ; and after it has been pronounced, the cause is at an end, and no further hearing can be had. It sometimes happens, however, that although the decree requires no reservation of further directions, yet there is a possibility of future interests arising which, having a potential existence only, cannot then be the subject of judicial decision, and which therefore prevent the cause from being altogether disposed of.

The partition of real estate between co-owners is effected, in equity, upon a bill filed for the purpose. The first decree in partition is interlocutory, founded upon the evidence in the cause, or on a master's or auditor's report ascertaining the interests of all parties, directing a commission to persons nominated by the parties, or, if necessary, by the court, empowering them to enter on and survey the estate, to make a fair partition thereof, to allot their respective shares to the several parties, and to make a return of their having done so to the court. In making the allotment, the commissioners ought to look to the respective cir-

cumstances of the several parties, and to assign to each that part of the property which will best accommodate him.

The return of the commissioners, when made, is confirmed by the court. The return is regarded in the same light as a verdict at law, and will only be set aside for such cause as would induce a court to grant a new trial. The confirmation of the return by the court does not operate on the actual ownership of the land, so as to divest the parties of their undivided shares, and reinvest them with corresponding estates in their respective allotments, but it requires to be perfected by mutual conveyances. The next step therefore, after confirmation of the return, is a decree that the plaintiffs and defendants do respectively convey to each other their respective shares, and deliver up the deeds relating thereto, and that in the mean time the allotted portions shall respectively be held in severalty. If any of the co-owners have settled or mortgaged their shares, directions will be given for framing the conveyances so that all parties shall have the same interests in the divided shares which they before had in the undivided shares. If the infancy of the parties or other circumstances prevent the immediate execution of conveyances, the decree can only extend to make partition, give possession, and order enjoyment accordingly until effectual conveyances can be made. If the defect arises from infancy, the infant must have a year and a day after attaining twenty-one years to show cause against the decree. In addition to the decree for a portion, the court may also, if either of the co-owners has been in exclusive receipt of the rents, decree an account of his receipts.

In Maryland the final decree confirms the portion,

and declares that each party shall hold his part in severalty, and the decree operates as a conveyance; and in all cases where a decree vesting a legal title to land in the complainant, is made, by statutory enactment, to operate as a conveyance, delivery of possession may be enforced by *injunction* and *habere facias possessionem*, forms of both of which writs can be seen in Part IV. of this treatise, as also the writ of assistance.

In case the estate cannot be exactly divided, the court will decree pecuniary compensation to one or more of the parties, for owelty or equality of partition, or charge part of the land with a rent, servitude, or easement for their benefit.

At any time before the final decree, exceptions may be filed against the return of the commissioners, for misconduct on their part, or irregularity in the execution of the commission, and perhaps, also, for irregularity in the partition. If the exception relies on matter apparent on the face of the proceeding, it is heard at the time of the final decree. If matter *in pais* is relied on, the party excepting must procure an order for taking depositions, which will also provide for the hearing.

Courts of equity are more frequently applied to for a sale for the purposes of partition among the heirs, than for an actual partition of the inheritance. The decree for the sale is final, as it determines the liability of the property to be sold. The proceeds of the sale are distributed by a future order when the cause comes on to be heard on further directions. This order is merely in execution of the decree, which was passed in order that the proceeds of sale might be distributed amongst those entitled thereto, according to the prayer of the bill.

Judicial sales in equity are effected by masters in chancery, trustees, or some other ministerial agent of the court, and the proceedings, though substantially the same everywhere, are more or less modified by legislation and the rules of different courts. The sales are made on the terms prescribed by the decree, and are reported, subject to exceptions by parties interested, to the court for ratification, and the purchase money is then distributed by an audit, made under the direction of the court, to the parties entitled, whether creditors, or distributees in partition, in accordance with the purpose of the suit in which the sale is decreed. Forms in Part IV. of this treatise will be a guide to the practitioner.

Assigning a widow's dower in equity, in regular practice, is by commissioners in like manner of making partition between co-owners of real estate. But such changes have been made in the matter, in different States, that the local practice must be ascertained by the practitioner, and cannot be pointed out in a treatise like this.

It is a general rule in equity practice, that a decree cannot be passed against the complainant compelling him to give relief to the defendant. The court can, generally, only give relief to the complainant according to the prayer of his bill, or else dismiss his bill. Out of this limitation of relief to the plaintiff, the remedy by a cross-bill has grown up in equity procedure.

A defendant sometimes finds it necessary to file a bill against the complainant, either for a discovery in the original suit; or for relief which cannot be obtained by a decree in that suit. And when any question arises between two defendants to a bill, it becomes

necessary for one of the defendants to file a cross-bill against the plaintiff and the other defendants to the original bill, or some of them, to bring the matters in dispute completely before the court, litigated by the proper parties and upon proper proofs, so that a complete decree may be made settling the rights of all parties involved directly and indirectly in the original suit. A cross-bill is in the nature of a defense to the original bill; and therefore a plaintiff to a cross-bill cannot compel an answer until he himself has answered the original bill. An answer to a cross-bill may be enforced by the same process that is used to compel an answer to an original bill. Testimony taken in the original cause may be used at the hearing of the cross-cause; and regularly the two causes ought to be heard together. A cross-bill is almost unnecessary for the purposes of discovery, as by an almost universal practice founded on legislative enactment, the defendant in equity may exhibit interrogatories to the plaintiff.

There is a practice in some courts of equity, as in Maryland, for instance, to give relief between defendants; and to a defendant against a plaintiff. On a bill by a vendee against the vendor, the usual decree is for payment of the purchase money, on the one hand, and for a conveyance on the other. And it is the universal practice in equity, where there is a decree for an account upon a dealing in trade, at a suit between partners, that each party is clothed with the rights of an actor; and the final decree may be in favor of the one or the other, according as the balance may appear. And, though a plaintiff may ordinarily, as of course, on application to the court, have his bill dismissed at any stage of the proceedings, on payment of costs, yet

where a decree for such account has been passed; as both parties are reciprocally plaintiffs and defendants, he cannot do so. And if, after such decree, the suit should abate by the death of either party, plaintiff or defendant, the surviving party, or the representative of the deceased party, may have it revived by a bill of revivor; because the defendant, after such decree, has as direct an interest in the continuation of the suit as the plaintiff, and may ultimately be as essentially benefited by it. The plaintiff can therefore get rid of such case only by a final decree, or by having entered on the docket the common rule, *further proceedings*, and upon the default of the defendant to proceed, obtain leave to dismiss his bill at the next term.

The form of the order in such case is: "Whereupon, it is *ordered*, that the defendant proceed in this case on or before the ——— day of the next term, or the plaintiff may, at any time thereafter, dismiss his bill, with costs. And it is further *ordered*, that the register enter upon the docket, as at the instance of the plaintiff, the rule *further proceedings*."

After such rule is entered, and the defendant neglects to proceed according to the order, the bill may be dismissed by the order of the plaintiff's solicitor, given to the register.

The examples just given seeming to ignore the difference between plaintiff and defendant in a suit in equity, do not impinge in the slightest degree upon the principle, *that a defendant cannot pray anything in his answer but to be dismissed the court. If he has any relief to pray, or discovery to seek against the plaintiff, he must pray for it by a cross-bill.* A defendant cannot make his answer a cross-bill, and under it obtain any specific decree in his favor, even



though the parties elect to consider the answer a cross-bill.

In some of the States of our Union, by express statutory provision, an answer is treated as a cross-bill, when the whole matter which would justify a cross-bill is set forth in the answer; and the same relief is obtained as by a cross-bill. This is however statutory practice.

We have thus considered every proceeding which is necessary, in equity procedure, to bring before the court every matter of fact and proof which can enable the court to pass a final decree on all the equities in the cause, and give to both plaintiffs and defendants their respective rights involved in the suit. Assuming therefore a final decree to be passed, we will next consider the steps which can be taken against it.

### *Rehearing and reviewing decrees.*

We now propose to consider the course adopted by a party who considers himself aggrieved by a decree or order of the court, and the means provided for enabling him to have it set right.

A decree may be reversed, by a petition for a rehearing, by a bill of review, and by an appeal to an appellate court. Clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission, may, at any time before enrollment, be rectified on motion or petition. But every order and decree is conclusive in regard to its subject-matter, until it is altered or reversed in one or other of the modes before enumerated. And a final decree before enrollment can only be altered on a rehearing; and after

enrollment, only upon a bill of review. And the same rule of alteration applies to interlocutory decrees or orders. Therefore the regular practice is for the court not to suffer a decree *for an account* to be signed and enrolled ; because if there should have been any defect in the directions of the decree, the enrollment ties up the court from rehearing it. Decrees for an account are therefore left open, in order to give parties an opportunity to rehear, when directions in a decree are imperfect. (2 Atk. 383.)

Chief Baron Gilbert, in his *Forum Romanum*, says :

“In the Court of Chancery all orders are interlocutory till they come to the definitive sentence, which is signed by the court ; for that sentence signed and enrolled is the definitive sentence in the cause, and all preparations before that are but interlocutory ; for the decree pronounced on the hearing, which is taken down by the register, is but an interlocutory sentence till it comes to be signed by the judge of the court and enrolled.

“Hence it is, that if the counsel are dissatisfied with the sentence or decree as it is first pronounced, they may sign a petition for a rehearing, and the court will grant one rehearing at least, before they sign and enroll such decree.”

The court cannot itself reconsider and reverse its opinions once expressed and made the groundwork of subsequent proceedings, without surprise, and perhaps irremediable injury to parties. Hence the propriety of a rule which requires a petition for a rehearing, addressed to the court, stating briefly the circumstances of the case, and the supposed errors in the decree, and the grounds of the objections.

It has been the practice in some courts of equity, when the rehearing is asked for the purpose of introducing new evidence, to make the application by petition accompanied by the affidavit of the party, verifying the facts to be proved, and affirming that they were discovered since the date of the decree, or at a time when they could not be introduced into the cause at the former hearing. But it is contrary to the fundamental principles of equity procedure to allow new evidence, at a rehearing, to be brought forward by a mere order upon the petition. The application should be for leave to file a supplemental bill to bring forward the new evidence, and for a rehearing of the cause, at a time when the supplemental bill should also be ready for a hearing. Upon the supplemental bill testimony could be taken on both sides to meet the new exigencies of the case. (*Jenkins v. Eldridge*, 3 Story, 303.)

Rehearing is not favored by the courts. And when granted, it is always upon strict limitations as to the evidence permitted. In order to avoid the danger of perjury, which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinched, and how his testimony bore upon it, as well as for other reasons, former witnesses are not allowed to testify, on a rehearing, to the same facts. And the rehearing will be granted under the terms that the interrogatories be settled and approved by the master, who will take care that the same witness is not a second time examined to the same facts. Should this requirement be not observed by the master, the deposition of the witness would be suppressed by the court. And merely cumulative and corroborative evidence is not allowed where it is oral corrobora-

rating evidence on one side, or contradicting evidence on the other. But where, at the original hearing, a document which was evidence in the cause was omitted to be read, or where the proof of an exhibit in the original cause was omitted, the court will make an order allowing them to be read or proved, saving just exceptions. And where a fact existed at the former hearing, but was not known to the party or put in issue by either party, it may be proved, if it be in issue. But new witnesses will not be allowed to prove facts then known or in issue.

A bill of review may be used to procure the reversal of a decree after signature and enrollment. It may be brought upon error of law apparent on the decree, or on occurrence or discovery of new matter. By the earlier and regular practice it was usual to draw up decrees with a special statement of, or reference to, the material grounds of fact on which the decree was based. To a bill of review of a decree so drawn, the defendant or party insisting on the benefit of the decree usually puts in a plea of the decree and a demurrer against opening the enrollment. There seems to be no necessity of pleading the decree so drawn if it is fairly stated in the bill, and a demurrer will be sufficient. And where, as in the United States courts and now in courts generally, the decree is drawn up without any statement of facts upon which it is based, and the bill of review for error apparent is founded upon the whole record, consisting of the bill, answer, and the other pleadings, and the decree, which must be stated in the bill, a demurrer alone is the proper defense to the bill against opening the enrollment.

If the plea and demurrer, or demurrer where it only is put in, are ruled good, the bill of review will be dis-

missed with costs. If they are overruled the decree will be rescinded, and a new decree will then be passed. In arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree, or on the record. But after the demurrer is overruled, the plaintiff is at liberty to read the bill, answer, or any other evidence, as at a rehearing, the cause being then equally open. After a demurrer to a bill of review has been allowed, a new bill of review on the same ground cannot be brought. But if on a bill of review the original decree is reversed, another bill may be filed to review this second decree. A bill of review for errors apparent upon the face of the record will not lie after the time when a writ of error could be brought, for courts of equity govern themselves in this particular by analogy of the common law in regard to writs of error. In the courts of the United States bills of review for errors apparent upon the face of the decree are limited to five years, that being the limitation of writs of error upon judgments at law. But a more accurate doctrine, it seems to us, is, that the time within which a bill of review for errors apparent on the decree must be brought, is, by analogy, the same as that within which an appeal from a decree may be taken; and this is by law different in different States, being in Maryland nine months from the date of the decree.

A bill of review upon newly discovered facts or matter cannot be brought without leave of the court. A petition is therefore filed, setting out shortly the facts of the case, together with the new matter which is proposed to be introduced; and the petition must be accompanied by the affidavit of the party that the matter could not be used by him at the former hearing.

Upon this petition an order *nisi* is passed. The opposing party may deny that the evidence proposed to be introduced was newly discovered; upon which depositions may be taken, and the issue must be settled before the leave is granted. The leave of the court being obtained, a formal bill of review is to be filed; to which the defendant demurs, pleads, or answers, as he may be advised; and the cause progresses in the usual way to hearing. The execution of the decree is not, in general, stayed by the granting of a rehearing, or by filing a bill of review. It is in the discretion of the court to suspend the decree simply, or on such conditions as may appear reasonable. If the decree has been executed, and is afterwards reversed, provision will be made for a restitution of the party aggrieved to his original rights.

It does not seem to be settled by authority whether the limitation of time for bringing a bill of review upon newly discovered facts and evidence is the same as that for bringing a bill of review for error of law apparent on the decree. It does, not, however, seem to be of much practical importance; as granting leave for filing such bill is in the discretion of the court, and lapse of time, in connection with other circumstances, will have weight with the court for refusing the application.

### *Appeals.*

The proceedings, as we have seen, on an application for a rehearing and on bill of review, are before the court which pronounced the decree. Another mode of rectifying any error in the decree is by an appeal to a court of errors or appellate jurisdiction. After a decree is enrolled it is a conclusive decree in equity, and

its errors, if any, can only be corrected by the expensive and dilatory proceeding by bill of review or by appeal. If, therefore, either party desire to have a rehearing he should enter a *caveat* against enrollment, which will stay it long enough to give him an opportunity to file his petition for a rehearing. We have considered the proceeding by bill of review against an enrolled decree; we will now consider that upon appeal.

The decrees of the chancellor in England were originally final and conclusive. No appeal from his decision seems ever to have been allowed before 1581. On the growth of the chancellor's jurisdiction in equity, the right of appeal to the House of Lords became established. The appeal was heard upon a mere paper petition. In this country the appeal is taken in substantially the same way, varying in different jurisdictions. In this country the right of appeal is generally confined to final decrees. But in England there is no practical distinction as to appeals between final and interlocutory decrees. The decree may be reversed or affirmed simply, or it may be corrected or modified by the court of appeal. If the decree be substantially right, the practice in England was to affirm it with modifications or exceptions. But in some of our courts, if the decree is found to be wrong in any particular, it is reversed, and a new decree is entered. And if it shall appear to the Court of Appeals that, for the purposes of justice, there ought to be further proceedings in the court below, the cause may be remanded for further proceedings, and the court in its order remanding the cause may express the reasons for doing so, and its opinion on all points which have been made before it, and which may be presented by

the record ; and the reasons and opinion contained in the order shall be conclusive on the court below. In such case, the party claiming the benefit of the decree of the appellate tribunal, should file a petition in the inferior court, setting out briefly the proceedings in the appellate tribunal, and all the material parts of the order or decree, and pray for such order as the case may require. A copy of the decree of the appellate tribunal should be filed with the petition. The court below thereupon passes an order which virtually reinstates the case before it, and it is proceeded with as if no appeal had been taken.

The course of procedure in appeals is, to a great degree, regulated by statute in most of the United States, and also in the Federal courts of equity. It is therefore inexpedient to treat the general subject more in detail.

### *Execution.*

We will now consider the manner of compelling obedience to a decree. The power of the court for this purpose, like that for compelling appearance or answer, was originally confined to process of contempt. If the disobedience was of an order for appearance and answer, it was a contempt of the *subpœna* ; if for performance of a decree, it was a contempt of the writ of execution, which, like the *subpœna*, issued under the great seal. In either case, the process of contempt was by the five successive steps of attachment, attachment with proclamations, writ of rebellion, sergeant-at-arms, and sequestration ; or in the case of a corporation, by *distringas* and sequestration. The only differences were, that an attachment for non-performance of a decree was not, like an attachment on *mesne*



process, a bailable writ ; that in the particular instance of a decree for delivering up an estate, the court might effectuate its own order by issuing a writ of assistance to the sheriff, commanding him to put the plaintiff in possession ; and that on a decree for payment of money, the receipts under a sequestration, though intended as a means of punishment, might indirectly operate as a performance.

The manner of compelling obedience to the decrees of the United States equity courts is prescribed by the 8th and 9th Rules of Practice in Equity, which are in the Appendix to this volume.

The practice in compelling obedience to the decrees of the equity courts of the different States is regulated to a great extent by statute. And everywhere the processes compelling obedience have been, from time to time, made more and more summary, and more like the modes of executing the judgments of courts of common law.

And this modified practice may, in a general way, be stated to be : Where the decree is for the payment of money, the party may resort to an immediate sequestration or to a *fiery facias* ; where it is for the delivery of the specific property, an immediate injunction may be issued, which may be followed by the usual process for contempt, or by a *habere facias possessionem*.\* And where the party is entitled to a conveyance, release, or acquittance, upon the refusal or failure of any party to execute a conveyance in accordance to the directions of the decree, the decree

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\* The writ of possession, or *habere facias possessionem*, is the peculiar execution of the action of ejectment. By statutory enactment, it has in some States been extended as a means of enforcing executions of courts of equity.

itself will operate as a conveyance; or adopting the modern English practice introduced by statute, when the execution of any instrument, or the making of any transfer or surrender is decreed, the court shall have authority, on default by the defendant, to direct a master to execute, surrender, or transfer in his stead. And where the decree is against a corporation, a *distringas*, and then a sequestration, may be had to enforce obedience. And as illustrative of the efficiency of the modern remedies against corporations established for private emolument, we will quote from the opinion of that great master of procedure in equity, Chancellor Bland, of Maryland, in *McKim v. Odom* (3 Bland, 422): "Evils and embarrassments (says the chancellor) must arise from a rigid adherence to the notion that such a corporation can only be forced to respond to a suit against it by *distringas* and sequestration of its property. Take the case of a turnpike road company that had refused to answer a bill in chancery. The road itself could not be taken and closed by virtue of a *distringas* or sequestration, because that, as one of the highways of the republic, it could not, and ought not to be, obstructed by any process whatever against those whose only interest in it is the toll they are allowed to exact in consideration of keeping it in repair. Consequently, in this instance, the only method by which the court could effectually levy upon its property, as a means of enforcing an answer, would be to appoint a sequestrator or receiver to take the place of the company's toll-gatherer at each gate along the whole line of the road." The same adaptation of the remedy to circumstances may be applied to enforce obedience to a decree against a corporation of a like character.

*Costs.*

Costs in equity do not; as at common law, follow the judgment of the court as a legal consequence, but are subject to the discretion of the court, and depend on circumstances. It is, however, the general inclination of the court to make costs follow the event of the suit; and cases occur in which the recovery of a small part of the demand is made to carry costs, although the principal subject of controversy may be decided in favor of the defendant.

Costs are never awarded against an executor or trustee personally, unless in a case of fraud or gross misconduct. The fund or estate is liable to all costs which may be necessary in the course of its administration or application, and is properly chargeable with the full costs incurred by the trustee or executor in its defense. But if, in the progress of a cause an executor offers untenable and vexatious grounds of defense, costs may be awarded against him personally. On a bill of interpleader the complainant is generally allowed his costs out of the fund.

The subject is, to a considerable extent, regulated by statute in the several States of our Union, but they do not change the general principles which we have here stated.

*Infants, idiots and lunatics.*

Proceedings in regard to the estates of infants, idiots, and lunatics are regulated in all the States of our Union, more or less, by statute; and are so much more summary than general equity procedure, that it is impracticable to make a treatise like this a guide for practice in such cases. We therefore refer to what is

said on the several subjects by Mitford, and to some forms at the end of this chapter, relative to proceedings in regard to infants' estates, as furnishing the general doctrines on the subject.

## PART IV.

### THE FORMS OF EQUITY PROCEDURE.

The great utility in consulting and adhering to the settled and well understood forms and language of courts has been often noticed by eminent judges. (8 Ves. 303; 3 Ves. 13; 19 Ves. 593; 5 D. M. G. 534; 1 M. & K. 246.) It is, therefore, necessary to understand all the different forms that constitute the administrative machinery which courts of equity have, from time to time, devised to meet the exigencies of cases as they arise, working out the equities on both sides, protecting defendants as well as relieving plaintiffs. These forms will be presented after some preliminary remarks upon their general characteristics.

Causes of suits in equity, and the defenses, are the same always and everywhere, and therefore must be stated in substantially the same words; and the forms of statement must be, in substance, the same. Therefore, the following forms, which have been gradually developed in general practice and established by usage as the regular forms of equity procedure, can be modified according to the special rules of every court, and thus serve as forms in every court of equity, Federal and State. They are, therefore, furnished as examples for students to learn, and practitioners to use, either

exactly as they are, or as modified by special rules established by legislation or orders of court. A book on equity procedure, designed, as this is, for universal use, can furnish only the typical forms of regular practice, and not the various modified forms of different courts in the several States of the Union. Most of the forms have been selected from books of established reputation as guides in equity procedure. But some of the bills have been selected from forms prepared by the present writer in his own practice, to suit cases so unusual in their exigencies that no forms could be found in books, setting forth the peculiar combinations of facts out of which the equities arose upon which the prayers for relief were founded.

The Constitution of the United States, in establishing the judicial department of the government and defining its jurisdiction, recognizes in the most absolute manner the distinction between cases in law and cases in equity; and the judiciary act of 1789 recognizes the distinction; and the Supreme Court of the United States has held, in a series of decisions, that the sixteenth section of the act is only declaratory, and makes no alteration in the rules of equity on the subject of legal remedies. (3 Pet. 215.) And that the remedies in the courts of the United States are to be, "not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." (3 Wheat. 222, 223.) And in 4 Wheat. 108, Chief Justice Marshall said, "The Circuit Courts of the United States have chancery jurisdiction in every State; they have the same chancery powers and the same rules of decision in all the States."

Regular equity procedure, as developed and established by the English High Court of Chancery, is as much the procedure of the Federal courts of equity as of those of the States. As this edition of Mitford is designed to teach the regular equity procedure, it has been thought best to give, in the Appendix of the volume, the rules of the Supreme Court of the United States modifying equity procedure, rather than to state the modifications in foot notes at the places where the regular doctrines are given. These modifications are, however, so partial as not to affect equity procedure materially. The system stands unchanged in the Federal courts. The form of a bill in equity will be found amongst the forms which follow, as modified according to the requirements of the rule prescribed by the Supreme Court of the United States.

As Federal courts are located in all the States, and the Supreme Court of the United States has prescribed rules of practice for all of them, both at law and in equity; and as, where appeals are taken to the Supreme Court in cases of equity, the rules regulating them have connection with the rules regulating cases at law carried up by writ of error, the rules for both courts, and also the forms of process of the Supreme Court, are given in the Appendix to this volume.

That equity practice in the Federal courts is connected with the practice at law, is shown by the provisions of "An act to further the administration of justice," approved June 1, 1872, to be found in the beginning of the Appendix to this volume. And in order to make the practical information about the Supreme Court complete, there is given in the Appendix "An act to fix the time for holding the annual session

of the Supreme Court of the United States, and for other purposes," approved January 24, 1873.

This volume will, therefore, enable lawyers all over the country to understand the practice in equity in the Supreme Court of the United States, as well as in the United States Circuit Courts; and thus furnish full practical information in equity cases within Federal jurisdiction. And, though the processes and rules of practice in cases at law in the Federal courts are not strictly germane to the subject of this volume, yet they are none the less valuable in themselves; and as there is, as has been shown, a connection between them and those in equity, it is deemed expedient to give them.

It is well to indicate, in conclusion, to the student, and, indeed, also to the practitioner, the disciplinary use of each kind of form in framing the machinery of equity procedure. That the forms of bills are useful in enabling the practitioner to draw bills, as well as to the student in learning their structure, is obvious enough. And that the forms of decrees are also useful, as patterns for drawing decrees, is obvious enough. And so of petitions and orders and all other formal acts in equity procedure. They all serve as patterns for drawing similar forms. But that one form in equity procedure is useful in showing how to frame another entirely different in its special function, is not so obvious; but yet it is so, and needs to be shown. The forms of decrees, for example, are very useful as a help in framing bills. Because the prayer of the bill is the part upon which the frame of the bill principally depends. The form of the decree sought, is, therefore, the best guide for framing the prayer which asks for the decree and foreshadows it. The decree contains the law of the case, and is the mold in which the

prayer must be cast. The study of the forms of decrees in various cases is, therefore, a useful discipline for enabling one to frame bills as well as decrees. And as all the forms in equity procedure have logical as well as practical relations to one another, and are founded on the same principles, the study of all aids in framing each one the more in accordance with the fundamental principles which underlie the whole scheme of equity procedure.

The forms given hereafter are not mere skeletons, but contain a full statement of all the facts, set forth in the cases in which they originated in practice. In this way causes of suit and defenses in equity are exhibited with special definiteness, by the forms; and also the nature and mode of relief appropriate to each cause of suit. Thus a practical insight is given into equity procedure as an administrative instrument, and not as a scheme of mere technical forms.

The common law, including equity, which our ancestors brought to this country, and upon which American jurisprudence is founded, was that which had been established by judicial precedents at the time of their emigration, and not that which has since been expanded in England by judicial decisions. We must, therefore, recur to that earlier period of the law in order to present American jurisprudence as a regularly expanded system of logically coherent principles, without any anomalies of alien doctrine interpolated by what claims to be modern reform. The great treatise of Mitford belongs to that earlier period of the law; therefore, in order to show its full import and its theoretical and practical value in the administration of equity in American courts, we must exhibit equity procedure as it existed at the time it was written, and of



which it is so masterly an exponent. For it matters not what changes may be wrought in equity procedure this treatise will be a perennial guide to the bench and the bar through all time ; and more especially if the common law shall be merged into an amalgamation with equity. Because the principles of equity procedure are rational principles, coincident with the laws of thought, and must lie of necessity at the foundation of every possible scheme of equity procedure ; and the more ignorantly and unsystematically any pretended reform of it is executed, the more need there will be of a scientific guide in the administration of equity, like the treatise of Mitford, supplemented, as it is, in the present volume.

For the foregoing reasons the English forms of the *subpœna*, and of the other writs, which are given in the following examples, are presented as the best precedents for both the student and the practitioner, who will find only modifications of them in our different courts of equity ; and each practitioner can easily learn the special modifications in the courts of their respective States. As we proceed, occasional remarks of a general character will be interspersed among the forms, showing some of the modifications they have undergone in American procedure. And from these, the general tendency and aim of those modifications can be understood.

The writ of *subpœna*, which every bill in equity prays against the defendant, is in the following form :

## FORM OF SUBPŒNA.

*George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to A. B. and E. R., greeting:*

For certain causes offered before us in chancery, we command and strictly enjoin you, that laying all other matters aside, and notwithstanding any other excuse, you personally appear before us, in our said chancery, the — day of — instant (or next ensuing), wheresoever it shall then be, to answer concerning those things which shall be then and there objected to you, and to do further, and receive what our said court shall have considered in this behalf; and this you may no wise omit under penalty of one hundred pounds; and have there this writ.

Witness ourself at Westminster, the — day of —, in the — year of our reign. [*Signed by the Chancellor.*]

As the writ does not name the complainant, it is indorsed,—“By the court: to answer at the suit of F. T.” By the American practice of the present day, the name of the complainant is inserted in the writ, thus, “to answer the complaint of F. T. against you in said court exhibited.”

In a State court, the *subpœna* or other writ begins, “State of —, to, &c.” In a United States court, it begins, “The President of the United States to, &c.” The form of a *subpœna* in the original jurisdiction of the Supreme Court of the United States is to be found in the Appendix to this volume.

The first of the compulsory processes which can be had against the defendant in case he does not obey the *subpœna*, is the writ of attachment, which is in nature

of a *capias* at common law. It is directed to the sheriff in the State courts of equity, and to the marshal in the Federal courts, commanding him to attach or take up the person of the defendant and bring him into court.

## FORM OF ATTACHMENT.\*

*George the Third, &c., to the Sheriff of —, greeting:*

We command you to attach A. B., so as to have him before us in our Court of Chancery, wheresoever the said court shall then be, there to answer to us, as well touching a contempt which he, as is alleged, hath committed against us, as also such other matters as shall then be laid to his charge; and further to abide such order as our said court shall make in this behalf; and hereof fail not, and bring this writ with you.

Witness ourself at Westminster, the — day of —, in the — year of our reign.

Indorsed, "By the court, at the suit of F. T. for want of appearance," or *answer*.

By the American practice, the name of the complainant is mentioned in the body of the writ, thus—"to answer as well touching a certain contempt by him committed in not appearing to, or *not answering*, the said bill of complaint of F. T., &c,"

Upon this writ, the sheriff returns either *cepi corpus*, or *non est inventus*. If the defendant is taken, he is detained in custody until he enters his appearance, and

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\* The general mode of compelling obedience to the orders of the court is by attachment. (2 Hogan, 20.) It always rests in the sound discretion of the court, whether the rule for an attachment shall be absolute or *nisi*; though the latter is the usual and safer course. (4 Johns. Ch. 58.)

puts in an answer to the plaintiff's bill ; or, on his refusal, a *habeas corpus* is awarded, commanding the sheriff to bring him into court, or a messenger of the court is dispatched for that purpose.

If the sheriff return *non est inventus*, an additional process is awarded against the defendant, an *attachment with proclamation*, which, besides the ordinary form of attachment, directs the sheriff to cause public proclamation to be made throughout the country, to summon the defendant on his allegiance personally to appear and answer the charges brought against him.

#### ATTACHMENT WITH PROCLAMATION.

*George the Third, by the grace of God, of Great Britain, France and Ireland King, Defender of the Faith, and so forth, to the Sheriff of —, greeting :*

We command you, on our behalf, to cause public proclamation to be made in all places within your bailiwick, as well within liberties as without, wheresoever you shall think it most convenient, that A. B. do, upon his allegiance, on the — day of —, personally appear before us, in our Court of Chancery, wheresoever it shall then be ; and nevertheless, in the mean time, if you can find the said A. B., attach him, so as to have him before us, in our said court, at the time before mentioned, there to answer to us, as well touching a contempt, &c. (as in the single attachment).

If this writ also be returned *non est inventus*, and the defendant still remain in contempt, a commission of rebellion is awarded against him for not obeying the king's proclamation according to his allegiance. This commission is generally directed to four commission-

ers, therein named, who are jointly and severally commanded to attach the defendant wherever he may be found within the kingdom. This process being against the defendant as a rebel, and to be dealt with as such, was considered too great a power to be executed by the officers of the court, and therefore was intrusted to commissioners answerable for their conduct to the court.

## COMMISSION OF REBELLION.

*George the Third, by the grace of God, of Great Britain, France and Ireland King, Defender of the Faith, &c., to H. B., L. D., E. F. and G. H., greeting :*

Whereas, by public proclamations made on our behalf, by the sheriff of Middlesex, in divers places of that county, by virtue of our writ to him directed, A. B. hath been commanded, upon his allegiance, to appear before us in our Court of Chancery at a certain day now past ; yet he hath manifestly contemned our said command ; wherefore we command you, jointly and severally, to attach, or cause the said A. B. to be attached, wheresoever he shall be found within our kingdom of Great Britain, as a rebel and contemner of our laws, so as to have him, or cause him to be, before us in our said court, on, &c., wheresoever it shall then be, to answer to us, as well touching the said contempt, as also such matters as shall be then and there objected against him, and further to perform and abide such orders as our said court shall make in that behalf. And hereof fail not. We also hereby strictly command all and singular, mayors, sheriffs, bailiffs, constables, and other our officers and loyal servants and sub-

jects, whomsoever, as well as within liberties as well as without, that they, by all proper means, diligently aid and assist you, and every one of you, in all things in the execution of these premises. In testimony whereof, we have caused these our letters to be made patent.

Witness ourself, at Westminster, the — day of —, in the thirty-fourth year of our reign.

If the commission of rebellion is returned *non est inventus*, the court, on motion to that effect, will dispatch a sergeant-at-arms in search of the defendant. The sergeant-at-arms is an officer by patent from the king, whose duty it is to attend upon the lord chancellor, and to execute the orders of the court upon those who in any respect contemn its jurisdiction.

If the defendant is taken upon any of these processes, he is committed to prison until he enter his appearance according to the forms of the court, and also clears his contempt by payment of the costs incurred by his contumacious behavior.

If the defendant shall elude the sergeant-at-arms, then upon the return of the sergeant-at-arms, and motion founded upon it, a writ of sequestration, the last and the most efficacious process of a court of equity, will be awarded. This writ is directed, like the commission of rebellion, to certain commissioners therein named, authorizing and commanding them to possess themselves of all his personal estate whatever, and the rents and profits of his real estates, until satisfaction is made of the complainant's demands, and the court shall further order.

#### SEQUESTRATION.

*George the Third, &c., to P. B., J. W., R. N., &c.:*

Whereas F. T., complainant, exhibited his bill of

complaint to our court of chancery, against A. B. and E. R., defendants. And whereas the said A. B., being duly served with a writ issuing out of our said court, commanding him, under the penalty therein mentioned, to appear to and answer the said bill, has refused so to do, and thereupon our process of contempt has issued against him unto a sergeant-at-arms. And whereas the said A. B. has of late absconded and so concealed himself, that the sergeant-at-arms has not been able to find him, as by the certificate of the said sergeant appears: Know ye, therefore, that we, in consideration of your prudence and fidelity, have given, and by these presents do give to you, any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever, of the said A. B., and to take, collect, receive, and sequester into your hands not only all the rents and profits of the said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estate of the said A. B.; and that you do collect, take, and get into your hands not only all the rents and profits of all his real estate, but also all his goods, chattels, and personal estate, and keep the same under sequestration in your hands, until the said A. B. shall fully answer the complainant's bill and clear his contempts, and our said court make other order to the contrary.

Witness ourself, at Westminster, the —— day of ——, in the thirty-third year of our reign.

The sequestration is personally served upon the tenants by two of the commissioners, which is consid-

ered as a seizing and sequestering under the authority of the writ. An order is then procured for the tenants to attorn to the commissioners, who are amenable to the court for the rents and profits. This order is also personally served. Should the execution of the writ be forcibly obstructed, a writ of assistance may be sued out directed to the sheriff of the county, commanding him to assist the commissioners in such execution.

Such are the successive processes of regular practice in equity by which an individual person, as defendant, is brought into court. But as a corporation aggregate is invisible, and cannot be served with personal process to compel an appearance, by statutory authority, it is now the practice to serve process on some officer or agent of the corporation, and then a distringas will be awarded against the property of the corporation, directed to the sheriff of the county or place where the corporation is resident.

#### DISTRINGAS.

*George the Third, &c., to the Sheriff of the City of London, greeting :*

We command you to make a distress on the lands and tenements, goods and chattels, of the mayor, commonalty, and citizens of our said city of London, within your bailiwick, so as neither the said mayor, commonalty, and citizens, nor any other person or persons for them, may lay his or their hands thereon, until our court of chancery shall make other order to the contrary ; and in the mean time you are to answer to us for the said goods and chattels, and the rents and profits of the said lands, so that the said mayor, commonalty, and citizens may be compelled to appear



before us in our said court of chancery, wheresoever it shall then be, there to answer to us as well touching a contempt, &c. (as in the attachment).

Witness, &c.

After service of the *distringas*, if the corporation continue in contempt, there issues an *alias* and a *pluries distringas*; and lastly, the sequestration is awarded against their lands, &c., as in other cases. But when the sequestration is once awarded against a corporation, it cannot, as it can against a private person, be stayed on entering their appearance.

After an order for a sequestration is obtained against a defendant, the complainant's bill is taken *pro confesso*, and a decree made accordingly; and the sequestrators proceed, under the control and authority of the court, actually to sequester the estates of the defendant, agreeable to the tenor of the writ, in order to make satisfaction for the injuries complained of in the bill. Since therefore this writ of sequestration never issues till after the plaintiff has obtained a decree on confession, it seems rather intended to enforce the performance of the decree of the court, than to be in the nature of process to bring in the defendant. And by the constitution of courts of equity, it is the only remedy that a plaintiff has where the defendant persistently refuses to appear. Because, unless the defendant comes in and contests the suit, the court has no authority to investigate the merits of the case stated in the complainant's bill, nor can there be any proof against an absent person. Therefore the benefit of the sequestration, which answers to the *quantum damnificatus* of the common law, is the only satisfaction which the complainant can obtain.

If, however, the defendant voluntarily, or upon

return of either of the processes mentioned, appears to the complainant's bill, he is then, within a definite time, to be fixed by the practice of the court, to give in upon oath the matter he has to offer in his defense.

The appearance of the defendant is entered by the register on his court docket, on application of the party or his attorney, and the defendant is then considered in court, and may move generally in the cause. But he may, before appearance, move to set aside any of the processes for irregularity ; and, in strictness, he should do so before appearance, because an appearance is considered as a waiver of irregularity.

The form of appearance in the Supreme Court of the United States will be seen in the Appendix to this volume.

In Maryland, the appearance of the defendant to a suit is by an order in the following form :

A. B.	}	In the Circuit Court of Baltimore City,
v.		
C. D.		
		— Term, 18—.

*Mr. Clerk :* Enter my appearance in this case for defendant.

\_\_\_\_\_,  
*Solicitor for defendant.*

Having just presented the various forms of the different writs of *mesne* process, by which a defendant is brought into a court of equity to answer a bill of complaint filed against him by a complainant, the forms of the different kinds of bills of complaint, and of all of the successive steps in a suit in equity, down to and including those of writs of execution of decrees, will

now be presented. These forms will be given under the following divisions :

1. Forms of bills in equity.
2. Forms of defenses in equity.
3. Forms of interlocutory and final proceedings.

Under the first of these divisions, in a few instances, besides the form of the bill, forms of subsequent steps in the proceeding will be presented, in order that the relations in practice of the successive steps may be more clearly discerned, than by seeing the forms separated from each other under the different divisions of equity procedure. And a like deviation from strict classification of forms is, for the sake of practical advantage, indulged to some extent in the subsequent divisions.



# FORMS.

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## I. FORMS OF BILLS IN EQUITY.

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### **Bill by Mortgagee against Mortgagor for Sale of Mortgaged Premises.**

*To the Honorable* , *Chancellor of Maryland:*

The bill of complaint of , of county, humbly shows, that heretofore, to wit, on the day of , in the year , a certain , of said county, being indebted unto your orator in the sum , current money, and intending to secure the payment thereof unto your orator, did, by his deed of that date, convey unto your orator and his heirs certain real estate lying in said county, and particularly described in said deed, to which said deed there is a condition annexed that it be void on payment by said to your orator of the aforesaid sum of money, with interest thereon from , on or before the day of in the year , as by a copy of said deed filed herewith as a part of this bill will more fully appear.

And your orator charges that no part of the aforesaid sum of money, or the interest accruing thereon, has been paid, but the same is still owing to him, although the time limited for the payment thereof by the condition aforesaid has passed, and payment thereof has been duly demanded of the said .

To the end, therefore, that the said may answer the several matters and things hereinbefore stated, as fully and particularly as if they were herein again repeated, and he was thereunto specially interrogated; and that the premises aforesaid, or so much thereof as may be necessary, may be sold for payment of your orator's claim, with interest as aforesaid; and that your orator may have such further or other relief as his case may require

May it please your honor to grant unto your orator the writ of *subpœna* against the said \_\_\_\_\_, of \_\_\_\_\_ county, commanding him to appear in this court at some certain day to be therein named, and to answer the premises, and abide by and perform such decree as may be passed therein.

\_\_\_\_\_,  
*Solicitor for complainant.*

NOTE.—*If payments have been made on account, they should be admitted in the bill, either specially, or by referring to some statement or account accompanying the bill, as in the following forms :*

And your orator admits, that the interest which accrued due prior to and on the \_\_\_\_\_ has been paid to him by the said \_\_\_\_\_; and he also admits the receipt of the further sum of \_\_\_\_\_, which was paid to him on the \_\_\_\_\_ for further interest, and in part of the principal debt secured by said mortgage. But he insists that the residue of said debt, with interest accrued thereon since the last mentioned day, is still due and owing to him.

*Or as follows :*

And your orator admits, that sundry payments have been made to him by the said \_\_\_\_\_, on account of said mortgage, as is more particularly admitted in the statement marked Exhibit B, and filed as part of this bill; but by said statement it appears, and so he insists, there is yet due to him on said mortgage a balance of \_\_\_\_\_ besides interest thereon from the day of \_\_\_\_\_

NOTE.—*A defendant is bound, upon a general interrogatory or prayer, to answer all the material averments in the bill fully and explicitly. In cases, therefore, where it is expected that there will be no controversy about the facts, special interrogatories are not usually inserted. Where, however, the case involves many circumstances which rest in the knowledge of a suspected defendant, or where, from any cause, a full and minute discovery is desired from him, the interrogatories should be drawn as particular and searching as possible.*

**Bill by Creditors against The Administrator and Heirs at Law of a Deceased Debtor for an Account of Personal and a Sale of Real Estate.**

The bill of complaint of A., B. and C., of                    county, who sue as well for themselves as all other creditors of D., late of said county, deceased, who will come in and contribute to the expenses of this suit, humbly shows, that a certain D., late of                    county, deceased, was in his lifetime indebted unto your orator A. in the sum of                   , current money, on his certain bond or obligation, dated on or about the                    day of                   , in the year                   , and conditioned for the payment to your orator, of the sum of                   , with interest thereon, from the date thereof, on or before a day long since passed; and unto your orator B., as executor of the last will and testament of one E., late of                    county, deceased, in the sum of                   , on a certain promissory note to the said E., in his lifetime, dated on the                    day of                   , and payable ninety days after the date thereof; and unto one F., of                    county (who has lately departed this life intestate, and upon whose personal estate your orator C. has lately administered), in the sum of                   , for sundry matters and things properly chargeable in account. As by your orators' Exhibits A, B, C, D and E, filed as part of this bill, will more fully appear.

[These exhibits should be the bond and promissory note, or copies of them, a copy of the open account, and certificates of the grant of letters testamentary and of administration to two of the complainants.]

And your orators further charge that the said D. being indebted as aforesaid unto your orators, and also unto divers other persons in large sums of money, and having real and personal property of great value, departed this life in the year                    intestate, and leaving G., who was late intermarried with one H., of                    county, I., K., L. and M., his children and heirs at law, of whom the said L. and M. are infants under the age of twenty-one years. And that, after the death of the said D., the said I. departed this life intestate, leaving a widow, N., and an only child, O., who resides in the State of Tennessee, and upon whom has devolved all his interest in the real estate of the said D.

And your orators further charge that administration of all and singular the personal estate of the said D. hath been lately granted by the Orphans' Court of                    county unto one P., of said county, who, in virtue thereof, has possessed himself of the said personal estate of great value; but your orators are informed and believe that the same is not sufficient to discharge

all his debts due or owing by the said intestate at the time of his death. And your orators are advised that the said personal estate in the hands of the said P. ought to be applied to the payment of the claims of your orators, and of other creditors of the said D., so far forth as the same will extend; and that any deficiency in the said personal estate ought to be supplied by a sale of the real estate of their aforesaid debtor.

But the said P. has wholly refused to pay any part of the aforesaid claims, or to render unto them any account of the aforesaid personal estate in his hands; and your orators are unable to obtain adequate relief against him, or against the aforesaid real estate, without the aid of this court.

To the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth, as fully and particularly as if the same were herein again repeated, and they were thereunto interrogated; and that the said P. may also set forth an account of the personal estate of his intestate, and the amount and particulars thereof, possessed by him, and what thereof is now in his hands, and how much thereof has been disposed of by him in payment of his intestate's debts or otherwise, and what debts, and to what amount, remain unsatisfied; and that the other defendants, heirs at law of the said D., may discover all and singular the real estates of which the said D. was seized or entitled to at the time of his death, and where the same and every part thereof is or are situate; that an account may be taken, under the direction of this court, of the said debts so as aforesaid due to your orators, and of all other debts which were owing by the said intestate at the time of his death, and which still remain unpaid; and also of the personal estate and effects of the said intestate received or for the use of the said P. as administrator aforesaid; and that the said personal estate may be applied, in due course of administration, in payment of the debts of the intestate due to your orators, and all other creditors who may come in and contribute to the expenses of this suit; and that the aforesaid real estate, or so much thereof as may be necessary for the purpose, may be decreed to be sold for the payment of so much of the aforesaid debts as may remain unsatisfied by the application of the personal estate as aforesaid; and that your orators may have such further or other relief as their case may require:

May it please your honor to grant unto your orators an order of publication giving notice to the said N. and O.; and also the writ of *subpoena* against the said P., H., and G., his wife, K., L. and M., of \_\_\_\_\_ county, commanding them, &c.



**Bill for Redemption of Mortgaged premises by Heir at Law of Mortgagor against Mortgagee who had entered into possession.**

The bill of complaint of A., of                    county, humbly shows: That heretofore, to wit, on the                    day of                    , in the year                    , a certain B., late of said county, but since deceased, being in his lifetime indebted unto a certain C., of said county, in the sum of                    current money, and intending to secure the payment thereof unto the said C., did, by his deed of that date, convey unto the said C. certain real estate, lying in                    county, and particularly described in said deed; to which said deed there is a condition annexed, that it be void on payment by the said B., his heirs, executors or administrators, unto the said C., of the aforesaid sum of money, with interest thereon from the                    , on or before the                    day of                    , in the year                    ; as by a copy of said deed, filed as a part of this bill, will more fully appear.

And your orator charges that, shortly after the execution of the said mortgage, C. entered into possession of the aforesaid premises, and the receipt of the rents and profits thereof, and still retains the same. That the said B. has lately departed this life intestate, whereby his equity of redemption of the aforesaid premises has descended to and vested in your orator, who is his only child and heir at law.

And your orator has applied to the said C. to permit him to redeem the aforesaid premises, and to enable your orator so to do, to account with your orator for the rents and profits of the said premises received by him, during the time he has been in possession thereof as aforesaid, which reasonable requests your orator hoped the said C. would have complied with.

But now so it is, the said C. pretends that the aforesaid B., in his lifetime, released unto him his equity of redemption in said premises, so that no right or equity to redeem the same exists or ever existed in your orator; and, at other times, the said C. pretends that the rents and profits received by him as aforesaid, amount to a very small sum of money, and have been expended in necessary and reasonable repairs and improvements on the premises; and that the principal of the aforesaid debts secured by said mortgage, with the whole arrear of interest from the date thereof, is still due and owing to him, and by these and like frivolous pretenses, he delays and intends to prevent a redemption of the premises by your orator. Whereas your orator insists, that all the pretenses advanced by the said C. are wholly unfounded, and that the said C., by taking the rents and profits of said premises as aforesaid, had satisfied unto himself the whole of the interest accruing on said mortgage,

together with a considerable part of the principal debt secured thereby; so that there remains due thereon a very small sum of money, which your orator will be ready to pay unto the said C. as soon as the precise amount thereof can be ascertained.

To the end therefore that the said C. may answer the several matters and things herein stated as fully and particularly as if they were here again repeated and he was thereunto specially interrogated, and may also render a full and particular account of the rents, issues and profits of the aforesaid premises received by him, or by any other person or persons for his use, or by his authority and direction, since he has been in possession thereof as aforesaid, with the several and respective times when, and persons from whom, and the purposes on account of which the same were received; and may discover at what yearly rent or rents the said mortgaged premises, and every part thereof, have or might have let during the term aforesaid; and to whom the same, and every or any part thereof, has in fact been rented during the said term; and if the same has not been rented, then that he may discover by whom, and in what manner the same has been used or cultivated. And that an account may be taken under direction of this court, of what is now due and owing from your orator to the said C. for principal money and interest, on security of the said premises, after allowing to your orator for the rents and profits thereof received by the said C. or any person or persons on his behalf, or which without his willful neglect and default might have been received by him since he entered into possession thereof as aforesaid; and that upon payment by your orator, of what, if anything, shall be found remaining due to the said C. on said account, the said C. may be decreed to surrender and deliver up the possession of the said mortgaged premises to your orator; and that your orator may have such further or other relief as his case may require: May it please, &c. [*praying for a subpoena as in the preceding bills*].

### **Foreclosure of a Mortgage.**

A bill for strict foreclosure prays that an account may be taken of what is due to the complainant on his mortgage, and that the mortgagor may be decreed to pay the amount found due, by a short day, to be appointed by the court; or in default thereof, that the mortgagor and all persons claiming under him, may be debarred and foreclosed of and from all rights and equity of redemption, in or to the mortgaged premises, &c.

The decree directs a reference to a master to take an account of the principal and interest due on the mortgage and to tax the mortgagee's costs, and directs that if the same are paid by the

mortgagor at such time and place as the master shall fix, the mortgagee is to reconvey the premises ; but orders, in default of payment at such time and place, that the mortgagor is to be absolutely foreclosed from all equity of redemption in the mortgaged premises.

### Decree for Strict Foreclosure.

[*Title of cause.*]

At, &c.

This cause coming on this day to be heard, upon the pleadings filed and the proofs taken therein, and \_\_\_\_\_, of counsel for the complainant, and \_\_\_\_\_, of counsel for the defendant, having been heard, it is ordered, adjudged and decreed, and this court by virtue of the power and authority therein vested doth order, adjudge and decree that it be referred to one of the masters of this court residing in the county of \_\_\_\_\_, to compute and ascertain what is due to the complainant for principal and interest upon the bond and mortgage mentioned in the bill in this cause. And it is further ordered that the said master tax the costs of the complainant in this cause, and add the amount thereof to the sum which shall be found due to the said complainant from the said defendant. [*If the mortgagee is, or has been at any time, in possession, add—*and that the said master take an account of the rents and profits of the mortgaged premises received by the said complainant or by any person or persons by his order, or for his use, and deduct what shall appear to be due on account of such rents and profits from the sum which shall be found due to the said complainant for principal and interest upon the said bond and mortgage.] And it is further ordered that upon the defendant's paying unto the said complainant the amount which shall be reported due to him for principal, interest, and costs, as aforesaid, within six months after the said master shall have made his report, and after the same shall have been confirmed, at such time and place as the said master shall appoint, that the said complainant do reconvey the mortgaged premises to the said defendant, by a suitable and proper instrument of conveyance, to be approved of by the said master in case the parties cannot agree upon the form thereof, free and clear of all incumbrances done by him, or by any person claiming by, from, or under him ; and that he deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said defendant, or to whom he shall appoint. And further, that the said complainant cancel and discharge such mortgage of record. But in default of the said defendant's paying unto the said complainant such principal, interest, and costs as aforesaid, by the time limited for that purpose, then it

is ordered, adjudged and decreed, that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises; which premises are described in the bill of complaint and in the said mortgage, as follows [*insert description*].

NOTE.—*The master's report must be filed, and regularly confirmed by orders nisi and absolute, unless the defendant will consent to confirm it absolutely in the first instance. The time appointed by the master's report for paying the amount found due by him, may be enlarged by the court. Even where no exceptions are taken to the master's report, the court has a discretion to enlarge the time. And in Edwards v. Cunliffe (1 Maddocks, 287), the court went so far, under the circumstances of the case, as to make a fourth order to enlarge the time; saying, however, "It requires a strong case to induce the court to make a fourth order." But in Nanny v. Edwards (4 Russell, 124), the court refused a first application by a mortgagor to enlarge the time for paying the mortgage money, because there was no excuse for his default stated by the mortgagor. The order enlarging the time is usually upon the terms of paying the interest and costs, as in the form which follows.*

### Order Enlarging Time for Payment.

[*Title of cause.*]

At, &c.

The report of the master to whom it was referred to compute and ascertain the amount due to the complainant in this cause for principal and interest on his bond and mortgage and tax his costs in this suit, having been filed and duly confirmed, from which it appears that there will be due to the said complainant, for principal, interest and costs, the sum of \$        on the        day of        instant, which was the time appointed by the said master for the payment thereof, and on reading affidavits, and on motion of       , solicitor for the defendant, and on hearing       , solicitor for the complainant in opposition thereto, it is ordered that upon the said defendant's paying to the complainant, on or before the        day of       , [*the time appointed by the master*], the sum of \$        reported due to the complainant for interest and costs on his said mortgage, by the said master's report, the time for the defendant's redeeming the said mortgaged premises be enlarged six months. And upon such payment, it is ordered that it be referred back to the said master to compute the complainant's subsequent interest, and tax his subsequent costs, including the costs of this application, and to appoint a new time and place for payment of what shall be found due to the complainant in respect thereof. But in default of the defendant's paying to the complainant the said sum of \$        by the time aforesaid, the defendant is to stand absolutely foreclosed.

**Bill for a Sale of Mortgaged Premises by Executor of Mortgage against a Non-resident Mortgagor.**

The bill of complaint of A., of                    county, executor of the last will and testament of B., late of said county, deceased, humbly shows that heretofore, to wit, on the                    day of                    , in the year                    , a certain C., then of                    county, but now residing in the State of                    (*beyond the jurisdiction of the court*), being indebted unto the said B., in his lifetime, in the sum of                    current money, and intending to secure the payment thereof unto the said B., did by his deed of that date, convey to the said B., and his heirs, certain real estate lying in said county, which is more particularly described in said deed. To which said deed there is a condition annexed that it be void on payment by the said C. to the said B., his executors, administrators, or assigns, of the aforesaid sum of money, with interest thereon from the                    day of                    , in the year                    , in *one* year from the date thereof, as by a copy of said deed, marked "Exhibit A," and filed herewith as part of this bill, will more fully appear.

And your orator further charges, that afterwards the said B. departed this life, leaving a last will and testament in writing, whereof he appointed your orator the executor, and that your orator has since duly proved the same, and obtained letters testamentary thereon from the *Orphans'* Court of                    county, as by \* *a certificate thereof given by the register of wills of said county*, marked "Exhibit B," and filed herewith as part of this bill, will more fully appear.

And your orator further charges, that by the death of the said B. without making any disposition thereof, the legal estate in the said mortgaged premises has descended to D., of said county, as only child and heir at law of the said deceased. But your orator is advised that it remains charged with the payment of the aforesaid debt and interest, and that, as the time limited by the said deed of mortgage for the payment thereof has elapsed, and no part of the aforesaid principal debt or interest accrued thereon has been paid, your orator is entitled to have the said mortgaged premises sold for the payment of his aforesaid demand.

To the end therefore that the said defendants hereafter named may answer the several matters and things hereinbefore stated as fully and particularly as if they were herein again repeated, and said defendants were thereto specially interrogated, and that the said mortgaged premises, or so much thereof as

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\* Proof of letters different in different States.

may be necessary for the purpose, may be sold for payment to your orator as executor aforesaid of his aforesaid claim, with interest as aforesaid; and that your orator may have such further and other relief as his case may require:

May it please your honor to grant unto your orator an order of publication, giving notice to the said C., who is a non-resident as before stated, of the substance and object of this bill, and warning him to appear in this court in person, or by solicitor, on or before a certain day, to answer the premises, and show cause, if any he has, why a decree ought not to pass as prayed; and also a writ of subpoena against the said D., of            county, commanding him to appear in this court, at some certain day therein named, to answer the premises, and abide by and perform such decree as may be passed therein, &c.

*Solicitor for complainant.*

**Order of Publication founded upon the foregoing Form.**

A.            }  
 v.            } In Equity, 8th September, 1860.  
 C. and D. }

The object of this suit is to procure a decree for a sale of certain mortgaged premises in            county, which were on the            mortgaged by the defendant C. to one B., since deceased, of whom complainant is the executor.

The bill states that on or about the            day of           , the said C. conveyed certain real estate, which is particularly described in the bill and its accompanying exhibit, unto the said B., in his lifetime, by way of mortgage to secure the payment of the sum of           , with interest from the            day of           , which was then due and owing from the said C. to the said B., in one year from the date thereof. That the said B. has lately died, leaving a last will and testament, of which he appointed the complainant executor, who has proved the same, and obtained letters testamentary thereon. That the legal estate in said mortgaged premises which descended to the defendant D., as the heir at law of the deceased mortgagee, is nevertheless charged with and liable to be sold for the payment of the above said debt and interest, and that the said C. resides out of the said State of

It is thereupon adjudged and ordered, that the complainant, by causing a copy of this order to be inserted in some newspaper published at           , once in each of three successive weeks, be-

fore the            day of            , give notice to the said absent defendant of the object and substance of this bill, and warn him to appear in this court in person or by solicitor, on or before the            day of            , next, to answer the premises and show cause, if any he has, why a decree ought not to pass as prayed.

NOTE.—Where a mortgage calls for promissory notes as evidence of the debt, they should be filed with the bill.

**Bill by Mortgagee, as Security in a Note against Mortgagor, for Sale of the Mortgaged Premises, where the Note described in the Mortgage had been paid by the Mortgagor with Money borrowed from a Third Person on a Note in which the Mortgagee was Security.**

*To the Honorable the Judge of the Circuit Court for Frederick county, sitting in equity:*

The bill of complaint of John Carlin, of Frederick county, humbly shows, that heretofore, to wit, on the tenth day of August, eighteen hundred and sixty, Isaac Simmons, the defendant in this case, was indebted to James Whitehill in the sum of \$1,000, on his promissory note dated the said tenth day of August, eighteen hundred and sixty; and John Carlin, your orator, was liable as security on said note, he having signed it as surety. That said Isaac Simmons, in order "to indemnify, secure, and save harmless said John Carlin, your orator, from all loss by reason of his liability as security as aforesaid," did, by his deed dated the fourth day of September, 1860, convey to your orator, John Carlin and his heirs, certain real estate lying in said county, and particularly described in said deed, to which said deed there is a condition annexed, that the said Isaac Simmons should pay the aforesaid sum of money, with legal interest thereon, and should "well and truly indemnify and save harmless the said Carlin (your orator) from all and every loss by reason of his liability as security, as hereinbefore recited," which deed was duly executed and recorded, as by a copy of said deed herewith filed as a part of this bill of complaint will more fully appear.

And your orator charges that no part of the aforesaid sum of money was paid by the said Simmons, and that after its maturity the said note was placed in the hands of one George Hanson, as an attorney, for collection. Thereupon the said Hanson agreed that if the said Simmons would pay half of the said sum of money due on the said note, and would procure an

additional security, he (Hanson) would discount a note for him to pay the balance. Whereupon John Carlin, your orator, together with one Ezra Benty, united with said Isaac Simmons in giving their joint and several note, dated the tenth day of August, 1862, for \$560, payable in six months, to the said George Hanson or order, and the money raised on said note, together with the \$560 paid by said Simmons, was applied to the payment of the note due the said James Whitehill. At the time your orator put his name as surety on said note given to the said George Hanson, it was understood by him and the said Simmons that the money raised on said note was to be applied to the payment of the balance due on the note to the said Whitehill; and this last note to the said Hanson is still unpaid and owing to the said Hanson, and has been long overdue.

To the end therefore that the said Simmons may answer the several matters and things hereinbefore stated, as fully and particularly as if they were herein again repeated, and he was thereto specially interrogated, and that the premises aforesaid, or so much thereof as may be necessary, may be sold for the payment of the said note, with interest as aforesaid, to the said George Hanson; and that your orator may have such other and further relief as his case may require:

[*Prayer for subpœna.*]

S. T.,  
*Solicitor for complainant.*

NOTE.—*The above bill is based upon a decision of the Court of Appeals of Maryland (12 M'd R. 78), which makes an important distinction between a mortgage given to the security and one given to the lender of the money. The case was taken up and argued by the present writer, the distinction between such mortgages being clear.*

**Bill against the Executor and Owners of the Real Estate  
of the Decedent, after a Final Account in the Or-  
phans' Court for Money advanced to pay Debts and  
Legacies.**

*To the Honorable William George Krebs, Judge of the Circuit  
Court for Baltimore City:*

The bill of complaint of Frederick R. Anspach and Susan M. Anspach, his wife, of Baltimore city, humbly shows, that a certain George Gale, late of Anne Arundel county, being possessed of a large real and personal estate lying and being in said county, did, on the sixteenth day of July, in the year eighteen hundred and fifty-six, make and execute his last will and testament in due form of law, and constituted and appointed Thomas



I. Richardson and John Thomas, of the county aforesaid, executors of his said will, and, without revoking said will, departed this life. That your oratrix was the wife of the said George Gale at the time of his death; and that, by his last will and testament aforesaid, after directing his debts to be paid and bequeathing certain legacies, he devised and bequeathed the residue of his estate, real and personal, to his then wife, your oratrix. All of which will more fully appear by a copy of said last will and testament herewith filed, marked "A," as a part of this bill of complaint. That letters testamentary have been granted on said will to the said Thomas I. Richardson by the Orphans' Court of Anne Arundel county.

That, after the death of the said George Gale, your oratrix, the then widow of said George Gale, gave birth to a daughter, the child of the said George Gale and your oratrix, and named said child Georgetta M. Gale. That, in order to make provision for said child, your oratrix did, on the seventeenth day of February, in the year eighteen hundred and fifty-seven, convey by deed to her father, Augustus Mathiot, two undivided third parts of the real and personal estate of the said George Gale, after the payment of his debts and the legacies given in his will, in trust for the said Georgetta M. Gale; and the said Augustus Mathiot accepted the trust. All of which will more fully appear by a copy of said deed of trust herewith filed, marked "B," as a part of this bill of complaint.

That, after the execution of said deed of trust, your oratrix intermarried with your orator, and is now his wife.

Your orator and oratrix further show, that the estate of the said George Gale consisted of two farms lying on or near West River, in Anne Arundel county, one of them commonly called Galesville farm, containing two hundred acres more or less; the other commonly called Westbury, containing eight hundred acres more or less, and the negroes and stock necessary for farming the said two farms. That the said George Gale died largely in debt; and that his debts, and the legacies under his will, could not be paid by his executor without selling the negroes and the stock, and thereby leaving the estate unproductive for want of the means of farming the land. That, upon the intermarriage of your orator and oratrix, the debts of the said George Gale, and the legacies under his will, were still unpaid. Your orator and oratrix, therefore, upon consultation, your oratrix being the natural guardian of the said Georgetta M. Gale, and acting on behalf of the said infant as well as for herself, agreed with your orator that he should make some arrangement with the executor of the said George Gale, by which the executor could settle his account with the Orphans' Court of

Anne Arundel county, without selling the personal property of the said George Gale. That thereupon your orator did make such an arrangement with the said executor Thomas I. Richardson ; and that your orator, by reason of said agreement with your oratrix, and said arrangement with the said executor consequent thereon, has paid out of his own funds large sums of money in liquidation of the just debts of the said George Gale, and the proper legacies bequeathed by his last will and testament. And your orator, because of the aforesaid agreement and arrangement, is liable for the payment, out of his own funds, of other debts of the said George Gale left unpaid by the said Thomas I. Richardson as executor, as aforesaid. That the said Thomas I. Richardson, by reason of the arrangement with your orator, and the assumption of the debts and legacies aforesaid by your orator, closed his final account with the Orphans' Court of Anne Arundel county ; as will appear by a copy of said final account, marked "C," herewith filed as a part of this bill of complaint.

That your orator, to his great surprise, is now advised, and so believes and alleges, that because of the settlement of his final account by the said executor in the Orphans' Court of Anne Arundel county, as aforesaid ; and because of the deed of trust made, as aforesaid, by your oratrix, although the deed conveys only after the payment of the debts of the said George Gale, and the legacies given in his will, he has no remedy at law for reimbursing or securing himself out of the property of the said George Gale for the money he has paid, or may hereafter pay, in liquidation of the debts and legacies which he assumed to pay, as hereinbefore stated. And your orator and oratrix further show, that until all the debts of the said George Gale and the legacies under his will are paid, it cannot be ascertained what property it is, or its amount, of which two undivided thirds have been conveyed by the aforesaid deed of trust to the said Georgetta M. Gale, as such two-thirds are of the property remaining after the payment of the debts and legacies aforesaid.

And your orator and oratrix further show, that it will be for the benefit and advantage of all interested in the said estate left by the said George Gale, deceased, and partially conveyed in trust as hereinbefore stated, that the farm called Galesville be sold to reimburse your orator in the sums of money which he has paid as hereinbefore stated, and to pay the debts and legacies which may be still unpaid, because the negroes and stock, which are the only personal property which could be applied to that purpose, are not more than sufficient for the cultivation of the other farm, called Westbury.

To the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth, as fully and particularly as if the same were herein again repeated, and they were thereunto interrogated; and that an account may be taken, under the direction of this court, of the debts and legacies due from the estate of the said George Gale, deceased, which have been paid by your orator, the said Frederick R. Anspach, and of all other debts which were owing by the said testator at the time of his death, and which remain unpaid; and also of the personal property of the said testator which was left after the settlement of the final account of the executor, the said Thomas I. Richardson, and now remains in whosoever possession; and that either the personal property, or so much of the real property as may be necessary for the purpose, whichever may, in the authority and discretion of the court, be most beneficial, advantageous and equitable to all concerned, be sold for the payment of the amount paid by your orator, as aforesaid, on account of the debts and legacies due from the estate of the said George Gale, and also for the payment of any debts which were due from the said testator at the time of his death, and are still unpaid, whether due to your orator or oratrix, or to any other creditors who may come in and contribute to the expenses of this suit; and that your orator and oratrix may have such other and further relief as their case may require:

May it please your honor to grant unto your orator and oratrix the writ of *subpœna* against the said Thomas I. Richardson, of Anne Arundel county, executor of the last will and testament of George Gale, deceased, and Augustus Mathiot and Georgetta M. Gale, of Baltimore City, commanding them, and each of them, to appear in this court, at some certain day to be therein named, to answer the premises, and abide by and perform such decree as may be passed therein, and as in duty, &c.

S. T.,

*Solicitor for complainant.*

NOTE.—*The interlocutory and the final decrees upon this bill are given immediately after this form.*

**Interlocutory Decree.**

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F. R. ANSPACH AND WIFE

vs.

THOMAS I. RICHARDSON AND OTHERS.

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*In the Circuit Court for  
Baltimore City,  
March Term, 1861.*

This cause standing ready for further proceedings, and being submitted, and the proceedings read and considered :

It is thereupon, this fourteenth day of March, in the year eighteen hundred and sixty-one, by William George Krebs, Judge of the Circuit Court for Baltimore city, and by the authority of said court, adjudged, ordered, and decreed, that an account be taken of and concerning the matters in the proceedings mentioned ; and that this cause be referred to E. Wyatt Blanchard as special auditor, and the same is hereby referred, with directions to take an account of the debts and legacies due from the estate of the said George Gale, mentioned in the proceedings, which have been paid by Frederick R. Anspach, a complainant in the cause ; also of all other debts which were owing by the said George Gale at the time of his death, and which remain unpaid ; also of any legacies under the will of the said George Gale which remain unpaid ; and also of the personal property of the said George Gale which remained after the final account settled by Thomas I. Richardson, the executor ; and also to inquire whether it will be for the benefit and advantage of all persons concerned in the property, that the real estate prayed in the bill to be sold, should be sold to pay any debts and legacies which may be found to be due from the estate of the said George Gale, instead of selling any personal property for that purpose. And that such account be taken from the pleadings and proofs now in the cause, and such other proofs as the parties may produce before him on giving the usual notice ; and that the complainant, by advertisement to be inserted in some newspaper printed in the city of Baltimore, and in some newspaper printed in the city of Annapolis, once a week for four successive weeks before the 20th day of April next, give notice to the creditors of George Gale, deceased, to file their claims with the clerk of this court, on or before the 20th day of May next.

WM. GEO. KREBS.

**Final Decree.**

F. R. ANSPACH AND WIFE

vs.

A. MATHIOT AND OTHERS.

*In the Circuit Court of  
Baltimore City,  
May Term, 1861.*

This cause standing ready for hearing, and being submitted, the counsel for the parties were heard, and the proceedings read and considered.

It is thereupon, this twentieth day of June, in the year eighteen hundred and sixty-one, by William George Krebs, Judge of the Circuit Court for Baltimore City, and by the authority of said court, adjudged, ordered, and decreed, that there is due from the estate of George Gale, late of Anne Arundel county, deceased, unto the complainant, Frederick R. Anspach, the sum of three thousand and ninety-three dollars and sixty-eight cents; and unto the complainant Susan M. Anspach the sum of one thousand and seventy-two dollars and sixty-one cents.

And it is further adjudged, ordered, and decreed, that the part of the real estate of the said George Gale, deceased, in the proceedings mentioned, called Galesville, or so much thereof as may be necessary for the purpose, be sold for the payment of the aforesaid sums of money due, as hereinbefore decreed, to the complainants respectively, and of other debts which may be found to be due said estate of George Gale, deceased.

That William F. Hause, of Anne Arundel county, be, and he is hereby appointed trustee to make such sale; and that the course of his proceedings shall be as follows: He shall first file with the clerk of this court, a bond to the State of Maryland, executed by himself and two sureties, to be approved by the clerk of this court in the penalty of fifteen hundred dollars, conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any further order or decree in the premises. He shall then proceed to make sale of the said land and premises called Galesville, having first given at least three weeks previous notice in some newspaper, printed and published at Annapolis, and such other notice as he may think proper, of the time, place, manner and terms of sale, which terms shall be as follows: The purchase money to be paid in three equal installments, the first to be paid on the ratification of the sale, and the second and

third in one and two years from the day of sale, both bearing interest from the day of sale, and to be secured by the bonds of the purchaser, with a surety or sureties to be approved by the trustee.

And as soon as may be convenient after such sale, the said trustee shall return to this court a full and particular account of the same, with an affidavit of the truth thereof and of the fairness of such sale annexed. And on the ratification of such sale by the court, and on the payment of the whole purchase money, and not before, the said trustee, by a good and sufficient deed, to be executed and acknowledged according to law, shall convey to the purchaser of said property, and to his or her heirs, the property to him or her sold, free, clear and discharged of all claim of the parties to this cause, and of any person or persons claiming by, from, or under them.

And the said trustee shall bring into this court, after deducting therefrom the costs of this suit, and such commission to the said trustee as this court shall think proper to allow in consideration of the skill, attention and fidelity wherewith he shall appear to have discharged his trust. Provided, however, that this decree, so far as the execution thereof may be stayed by the act of the General Assembly of Maryland, passed at its special session in the year 1861, creating a stay upon judgments and decrees, shall not be executed until the stay created by said act shall cease to operate.

WM. GEO. KREBS.

**Bill for Partition between Joint Tenants or Tenants in Common.**

*To the Honorable                      , Judge of the Circuit for*

The bill of complaint of A., of                      county, humbly shows, that he is seized in fee of one undivided moiety of a tract or parcel of land, lying in said county, called                      , containing                      acres of land more or less, and that the other undivided moiety of said land is held by one B., of                      county.

And your orator charges that he is desirous of having a partition of said land made between the parties, according to their aforesaid interests, and has applied to the said B. for that purpose. But his reasonable applications in this behalf have been rejected by the said B., and your orator is advised that he has no redress except by an appeal to this court.

To the end, therefore, that the said B. may answer the premises, and that a decree may be passed by this court for a partition of said land between the said B. and your orator, according

to their respective interests, as before stated, and may have such further or other relief as his case may require :

May it please your honor to grant, &c. [*as in first form of bill.*]

NOTE.—Where all the joint tenants or tenants in common are of full age, and one or more refuse to agree to a partition, the other or others are entitled to a partition, though it be shown to be ruinous to all parties. The court has no discretion, but must decree a partition. But where any of the joint tenants or tenants in common are infants under the age of twenty-one years, it must be shown that partition will be for the benefit and advantage of all the part owners.

### Bill for Partition between Parceners.

To the Hon. , Judge of the Circuit Court of County :

The bill of complaint of A. and B. his wife, C. and D. of county, humbly shows, that heretofore a certain M., late of county, deceased, was in his lifetime seized and possessed of certain real estate lying and being in said county ; and being so thereof seized and possessed, some time in the year departed this life intestate, leaving your orators B., C. and D., and the defendants E. and F., his only children and heirs at law. And, that the said E. and F. are infants under the age of twenty-one years.

And your orators further charge that the said real estate is not susceptible of partition amongst the parties aforesaid, and that if it cannot be divided between them with advantage to all the parties, then that your orators will be entitled to have the same sold, and the proceeds of sale distributed amongst the parties, in proportion to their respective interests. The said real estate is described in a deed, a copy of which is filed as a part of this bill of complaint, marked "Exhibit A;" the original of which deed is recorded in Liber J. T., folios 247, 248, one of the Land Records of the county last aforesaid.

To the end, therefore, that the said E. and F. may answer the premises, and that a decree may be passed for the partition of the aforesaid real estate amongst the parties aforesaid ; or in case a partition thereof cannot be effected, then that the same may be sold under the direction of this court, and the proceeds thereof be distributed amongst the said parties in proportion to their respective interests, and that your orators may have such other or further relief as their case may require :

May it please your honor to grant unto your orators the writ of subpoena, &c. [*as in the first form.*]

**Bill for the Sale of Real Estate of Parceners where one of the Owners is a Lunatic, Non-Resident, and Another is an Infant, Non-Resident.**

*To the Honorable the Circuit Court of the District of Columbia, sitting in Washington County as a Court of Chancery:*

The bill of complaint of George Schley and Mary H. Schley his wife, of Washington county, in the State of Maryland, and of James M. Schley and Ellen N. Schley his wife, of Alleghany county, in the State of Maryland, respectfully shows: That heretofore a certain Frederick A. Schley, late of Frederick county, in the State of Maryland, deceased, was, in his lifetime, seized and possessed of certain real estate lying and being in Washington city, designated on the plat of said city as lot No. 6 in square 103, containing 9,203 square feet, and being so seized and possessed, on the fifth day of February, in the year eighteen hundred and fifty-eight, departed this life intestate, leaving your orators George Schley and James M. Schley and William Henry Schley and Buchanan Schley his only children and heirs at law, upon whom devolved all interest in the real estate of the said Frederick A. Schley. And your orators charge that the said William Henry Schley is lunatic and incapable of managing his estate, and that Buchanan Schley is an infant under the age of twenty-one years, and that both of said children reside in the State of Maryland.

And your orators further charge that the land is not susceptible of division, and that it will be for the benefit of the said William Henry Schley and the said Buchanan Schley, as well as of the complainants, that the said lot of ground be sold, as it is vacant and unimproved, and is not likely to so advance in value as to make it desirable on account of said William Henry Schley and Buchanan Schley, that said lot should remain unsold, as an agent would have to be employed to look after the same, and it is probable that the lot has already attained its full value so far as the interests of the said William Henry and Buchanan are to be affected.

As your orators can have relief only in your honorable court, they pray your honors that a decree may be passed for the sale of said lot under the direction of this court, and that the proceeds of the sale may be distributed amongst the said parties in proportion to their respective interests, and that your orators may have such further or other relief as their case may require.

May it please your honors to grant unto your orators an order of publication, giving notice to the said William Henry Schley, who is a non-resident as before stated, of the substance and object of this bill, and warning him to appear in this court in person or by solicitor, on or before a certain day, to answer



the premises, and show cause, if any he has, why a decree ought not to pass as prayed; and also a commission to three persons in Washington county, in the State of Maryland, authorizing them or any two of them to go to said Buchanan Schley, who is an infant non-resident as before stated, and appoint a guardian for the purpose of answering and defending this suit, and also to take the answer and return it to this court. And as in duty, &c.

S. T., *Solicitor for complainants.*

On this 9th day of April, 1860, appeared Samuel Tyler, solicitor for complainants, before the undersigned, and made oath on the Holy Evangelists, that William Henry Schley and Buchanan Schley, defendants named in the foregoing bill, reside beyond the limits of the District of Columbia, and within the State of Maryland.

WM. M. MERRICK, *A. J.*

**Order to Appoint a Guardian to Infant to Answer the foregoing Bill.**

In the Circuit Court of the District of Columbia, sitting in Washington county as a Court of Chancery.

GEORGE SCHLEY and MARY H. SCHLEY  
his wife, and JAMES M. SCHLEY  
and ELLEN N. SCHLEY, his wife,

*vs.*

WILLIAM HENRY SCHLEY and  
BUCHANAN SCHLEY.

It appearing from the bill of complaint in this suit that Buchanan Schley, one of the defendants, is an infant under the age of twenty-one years, and that he resides in Washington county, in the State of Maryland, it is upon the motion of the complainants, by their solicitor, Samuel Tyler, this ninth day of April, 1860, adjudged and ordered that a commission issue from this court, directed to Daniel Weisel, Alexander Niel, and Andrew K. Seister, Esquires, of Washington county, in the State of Maryland, authorizing them, or any two of them, to go to the said infant Buchanan Schley, and appoint a guardian for the said infant, to answer and defend this suit, and that they take the answer of said guardian and return the same to this court.

By order of WM. M. MERRICK, *A. J.*

**Affidavit of Lunacy.***District of Columbia, to wit:*

Personally appears before the subscriber, a justice of the peace, S. T., and makes oath in due form of law, that he has known for more than twenty years William Henry Schley, one of the defendants in the case in the Circuit Court of the District of Columbia, No. 1608, Equity, in which George Schley and wife and James M. Schley and wife are complainants, and William Henry Schley and Buchanan Schley are defendants, and that during all the time this affiant has known the said William Henry Schley he has been *non compos mentis*, incapable of managing his affairs, and that the said William Henry Schley is now, according to this affiant's information and belief, confined as a lunatic in Mount Hope Hospital, at Baltimore City, in Maryland.

Sworn this 16th day of October, 1860, before  
 JACKIN THOMAS,  
*J. P.*

**Order appointing a Guardian ad litem for the Lunatic.**

It is ordered by the court, this 17th day of October, 1860, that Wm. R. Woodward, be and he is hereby appointed guardian for Wm. Henry Schley, within named defendant, to protect his interest in the equity suit of George Schley and others against him and Buchanan Schley, pending in this court.

(By order of court.)

Test'y. J. A. SMITH,  
*Clerk.*

**Answer of Wm. Henry Schley, by Wm. R. Woodward, his Guardian, to the Bill of George Schley and others, in the Circuit Court of the District of Columbia.**

This respondent, not being able personally to answer, but answering by the subscriber, appointed his guardian *ad litem*, says he believes the facts stated in the bill to be true as stated, and submits his interests to the care and disposition of the court.

WM. R. WOODWARD.

Sworn, in open court, this }  
 17th Oct., 1860. }  
 Test. J. A. SMITH,  
*Clerk.*

**Commission to appoint Guardian ad litem for Infant,**

Circuit Court of the District of Columbia,  
sitting as a Court of Equity for Wash-  
ington county.

*The United States of America to Daniel Weisel, Alexander  
Niell, and Andrew K. Seister, greeting :*

Whereas, George Schley and Mary H. Schley, his wife, and James M. Schley and Ellen N. Schley, his wife, have lately exhibited their bill of complaint before us, in our court above mentioned, against William Henry Schley and Buchanan Schley, defendants. *And whereas* we have, by our writ, lately commanded the said defendants to appear before us in our said court, at a certain day, to answer the said bill, but forasmuch as Buchanan Schley is an infant under age, and cannot answer said bill, nor defend this suit without having a guardian assigned in that behalf: *Know ye, therefore,* that we have given unto you full power and authority, in pursuance of the special order in our said court, to assign and appoint a guardian for the said infant, and to take the answer of the said infant by such guardian; and therefore we command you that at such certain day and place as you shall think fit, you go to the said infant defendant, if he cannot conveniently come to you, and assign and appoint a guardian for the aforesaid infant, and take the answer of the said infant, by such guardian, to the said bill, on such guardian's corporal oath upon the Holy Evangel, to be administered by you, the said answer being plainly and distinctly written; and when you shall have so taken the said answer, you are to send the same, closed up under your seals, together with your certificate of your having assigned and appointed such guardian as aforesaid, and this writ unto us in our said court.

Witness, the Hon. James Dunlop, chief judge of our said court, at the city of Washington, the seventh day of March, 1860.

Issued this ninth day of April, 1860.

J. A. SMITH,  
*Clerk.*

S. T.,  
*Solicitor.*

**The Answer of Buchanan Schley, an Infant under the Age of Twenty-one Years, by Harriett A. Hall, his Guardian, to the Bill of Complaint of George Schley and others against him, in the Circuit Court of the District of Columbia, sitting as a Court of Equity in Washington County.**

This defendant cannot admit any of the matters and things alleged in the said bill, and being an infant of tender years, submits his rights to the protection of this court.

HARRIETT A. HALL,  
*Guardian.*

On this 17th day of September, 1860, the above named Harriett A. Hall appeared before us, as commissioners, and made oath that the matters and things stated in the foregoing answer are true to the best of her knowledge and belief.

D. WEISEL,  
A. NIELL,  
A. K. SEISTER,  
*Commissioners.*

*State of Maryland, Washington County, to wit:*

We, the undersigned, commissioners named in the within commission, do hereby certify to the honorable the Circuit Court of the District of Columbia, sitting in equity for Washington county, that we have, in pursuance of the power and authority therein, assigned and appointed Harriett A. Hall, of Washington county, Maryland, guardian for Buchanan Schley, the infant therein named, we having first gone to said infant, and have taken the answer of said infant, by said guardian, to the bill therein named, upon her corporal oath administered by us, which answer is hereto annexed and made part of this return.

Given under our hands and seals, at Hagerstown, Maryland, this 17th day of September, 1860.

D. WEISEL. [SEAL.]  
A. NIELL. [SEAL.]  
A. K. SEISTER. [SEAL.]

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GEORGE SCHLEY AND OTHERS

vs.

WM. HENRY SCHLEY AND OTHERS.

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*In Equity. No. 1608.*

This cause coming on to be heard upon the order of publication against the non-resident defendant Wm. Henry Schley, heretofore passed in said cause, and which appears to have been published pursuant to such order, and also upon the answer of the defendant Buchanan Schley, and also upon the answer of Wm. Henry Schley, by Wm. R. Woodward, who has been appointed guardian *ad litem* for said last-named defendant, as to both of which defendants the cause has been set for hearing by consent; it is therefore, this 18th day of October, 1860, ordered by the court that, preliminary to a final decree, the cause be referred to W. S. Cox, special auditor, to inquire and report, first, whether the lot in the bill mentioned be susceptible of specific partition between the complainants and defendants; and if not, second, whether it will be for the benefit and advantage of the minor defendant and the other parties to the cause that the same should be sold for the purpose of division; that he report the value of said lot, and take testimony, and return the same with his report, giving reasonable notice to the parties, &c.

(By order of the court.)

Test. J. A. SMITH,

*Clerk.*

### Auditor's Report.

*Circuit Court of the District of Columbia }  
for the County of Washington. }*

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GEORGE SCHLEY AND OTHERS

vs.

WM. HENRY SCHLEY AND OTHERS.

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*In Equity. No. 1608.*

The undersigned, to whom the above cause was referred as special auditor, respectfully reports, that, after notice to counsel, he proceeded to inquire into the matters referred to him.

He took the deposition of Wm. Gunton, which is hereto annexed.

It appears that the lot is in an improving part of the city, where sites are generally selected with a view to erecting fine buildings. This lot has  $71\frac{1}{2}$  feet front. If divided specifically between the parties, who are four in number, it would make four lots of less than eighteen feet front each, a very undesirable division for this locality. They would not be equal in value, as the corner lot would be considered best; and they could only be equalized in value by still further reduction of the size of the other lots.

The auditor is therefore of opinion, that, although a division in specie might be made, it would not be advantageous or for the interests of the parties concerned. The lot is vacant, yielding no income, but bringing the owners in debt for taxes. It has had a pavement laid in front, and is in a good condition for sale. It is, therefore, the judgment of the auditor, that it would be for the benefit and advantage of the infant defendant, as well as the other parties to the cause, that the property should be sold for division.

The value of the property is about \$4,000.

Respectfully submitted.

November 2, 1860.

W. S. COX,

*Special Auditor.*

SCHLEY

*vs.*

SCHLEY.

*In Equity. No. 1608.*

Wm. Gunton, being duly sworn, says: I am familiar with the property mentioned and described in the papers in this cause. I have been paying the taxes on it for about thirty years or more. I do not think the lot could be advantageously divided between the four parties to this suit. It would give less than eighteen feet front to the lots, whereas in that part of the city the lots would sell much better with a larger front.

I think that, for this reason, it would be for the advantage of the parties to have sale and a division of the proceeds. I value the lot at about \$4,000.

WM. GUNTON.

Sworn to, this 2d of November, }  
1860, before

W. S. Cox,

*Special Auditor.*

**Order of Publication.**

In the Circuit Court of the District of Columbia, sitting in Washington county as a Court of Chancery.

GEORGE SCHLEY AND MARY H.  
SCHLEY, his wife, and JAMES M.  
SCHLEY AND ELLEN N. SCHLEY,  
his wife,

*vs.*

WILLIAM HENRY SCHLEY AND BU-  
CHANAN SCHLEY.

The object of this suit is to procure a decree for a sale of certain real estate lying and being in Washington city, and designated on the plot of said city as lot No. 6, in square 103.

The bill states, that a certain Frederick A. Schley, late of Frederick county, in the State of Maryland, was seized and possessed of the aforesaid lot or piece of land, and being so seized and possessed, on the fifth day of February, in the year eighteen hundred and fifty-eight, departed this life intestate, leaving the parties to this suit, George Schley, James M. Schley, William Henry Schley, and Buchanan Schley, his only children and heirs at law. That the said William Henry Schley is a lunatic, and incapable of managing his estate, and the said Buchanan Schley is an infant under the age of twenty-one years; and that both the said lunatic and infant reside in the State of Maryland. That it will be for the benefit of the said lunatic and infant, and of all the other parties concerned, that said lot or piece of land be sold, and the proceeds of sale be divided amongst the parties according to their respective rights.

It is, therefore, this ninth day of April, in the year 1860, adjudged and ordered, that the complainants, by causing a copy of this order to be inserted in some newspaper published in Washington city, once a week for six successive weeks, the first insertion to appear at least four months before the first Monday of September next, give notice to the said William Henry Schley of the object and substance of this bill, and warn him to appear in this court in person or by solicitor, on or before the first Monday of September next, to answer the premises, and show cause, if any he has, why a decree ought not to pass as prayed.

WM. M. MERRICK, *A. J.*

SAMUEL TYLER, *Solicitor.*

[True copy.]

Test. J. A. SMITH, *Clerk.*

**Certificate of Publication of the Foregoing Order.**

*Office of the National Intelligencer,*  
 Washington, October 9, 1860. }

We hereby certify that the advertisement, of which the annexed is a copy, was published in the National Intelligencer once a week for six successive weeks, commencing on the 11th day of April, 1860.

For GALES AND SEATON,  
 ED. S. FLETCHER.

**Form of Setting Case for Hearing by Consent, which is usually indorsed on the Bill.**

Set for hearing by consent.

SAM. TYLER, *for complainants.*  
 WM. R. WOODWARD, *for defendants.*

**Final Decree.**

GEORGE SCHLEY AND OTHERS

*vs.*

WM. HENRY SCHLEY AND OTHERS.

*In Equity. No. 1608.*

The above cause having been set for hearing by consent, upon the bill, answers, and order of publication against Wm. Henry Schley, and having been referred to W. S. Cox, special auditor, to inquire and report whether the premises in the bill named could be specifically divided among the complainants and defendants, and if not, whether it would be to the advantage of all the parties that the same should be sold; and the cause now coming on for final hearing upon the bill, answers, order of publication (which appears to have been published as directed), and the report of the said auditor and deposition, and the court being satisfied that it will be for the interest and advantage of the minor defendant in said cause as well as of all other parties to the same, complainant and defendant, that the said premises should be sold for the purpose of division among them; it is, therefore, this 5th day of November, 1860, ordered, adjudged and decreed, that the said bill, and the matters there-



of, be, and the same are hereby, taken for confessed against the said Wm. Henry Schley, in order, &c. ; and the court proceeding to pronounce such decree as is right and proper as to all the parties to the cause, do further order, adjudge and decree, that the said premises in the bill mentioned, to wit, lot number six in square number one hundred and three, in the city of Washington, be sold for the purpose of division among the said complainants and defendants ; that for such purpose Samuel Tyler be, and he is hereby, appointed trustee, who shall give bond to the United States in the penalty of eight thousand dollars, with security to be approved by the court, or one of the judges thereof, for the due and faithful execution of the trust hereby reposed in him ; that such sale shall be made at auction, after advertising the time, terms and place of sale three times a week for three successive weeks in the National Intelligencer, and otherwise as the trustee shall think right, prior to the day of sale, the terms of sale to be one-fourth of the purchase money in cash, and the residue in three equal installments of six, twelve, and eighteen months, with interest from the day of sale until paid, the purchaser to give bonds for the deferred payments with security to be approved by the trustee, and a lien on the premises to be retained as additional security ; that the trustee have authority to postpone the sale from time to time, and to resell on default of any purchaser, giving reasonable notice of any such resale ; that he make report of his proceedings, from time to time, and of the fairness of the sale made by him, on oath, and bring the proceeds of sale into court to be distributed as the court shall direct ; and, further, that, on payment of the purchase money and final ratification of the sale, the said trustee convey the premises sold to the purchaser in fee simple.

(By order of the court.)

Test. J. A. SMITH, *Clerk*.

On motion of complainants it is, this 7th day of January, 1873, ordered, that the "Morning Chronicle" be substituted in place of the "National Intelligencer," as the paper in which to advertise the notice of sale directed by the decree in this cause.

By the court,

A. WYLIE, *Justice*.

In the Supreme Court of the District of Columbia, sitting in equity at a Special Term, July, 1869, held by Justice Olin, this 16th day of July, 1869.

GEORGE SCHLEY AND OTHERS

vs.

SCHLEY AND OTHERS.

The petition of Samuel Tyler, trustee in No. 1608 Equity, respectfully shows, that his name was originally inserted as trustee merely *pro forma* in the decree in this case for the sale of the property therein decreed to be sold. The petitioner, therefore, prays that George Schley and James M. Schley, complainants in the cause, be substituted as trustees in his stead.

SAMUEL TYLER, *Trustee*.

I do solemnly swear that I have read the above petition subscribed by me, and know the contents thereof, and that the facts therein stated, upon my personal knowledge, are true, and that the facts therein stated upon information and belief, I believe to be true.

SAMUEL TYLER.

Sworn before me, July 16, 1869.

R. J. MEIGS, *Clerk*.

Upon the above petition of Samuel Tyler, it is, this 16th day of July, 1869, ordered, adjudged and decreed, that George Schley and James M. Schley be, and they are hereby, appointed trustees in the stead of the said Samuel Tyler, subject to the terms, conditions and modes of proceeding prescribed in the decree for the trustee in making sale of the property decreed to be sold in No. 1608 Equity.

A. B. OLIN, *Justice*.

NOTE.—*The foregoing is the regular procedure for the relief prayed in the bill. More summary proceedings in such cases have been introduced into equity practice in some of the United States, where there are no non-resident parties.*

**Bill to have an Agreement, defective by mistake, rectified; and the specific performance of the rectified Agreement decreed.**

*To the Honorable Madison Nelson, Judge of the Circuit Court for Frederick County, as a Court of Equity :*

The bill of complaint of Rebecca C. Kemp, of Frederick county, humbly shows, That heretofore, on or about the 27th of January, in the year eighteen hundred and fifty-seven, a certain Grafton A. Clagett, of the said county, agreed with your oratrix to purchase from her a certain house and farm in the neighborhood of Frederick City, in said county, for the sum of eight thousand five hundred dollars, four thousand five hundred dollars to be paid on the first day of April, in the year eighteen hundred and fifty-seven; the balance, in four equal annual payments, with interest, to be secured by notes with security, and to remain a lien on the property sold. On the payment of the four thousand five hundred dollars, the said Rebecca C. Kemp was to execute to the said Grafton A. Clagett a good and sufficient deed for said property. It was further agreed that there are fifty-two acres of land in the said farm. The grain growing on the farm was to belong to the said Grafton A. Clagett. Full possession was to be given on the first day of April, eighteen hundred and fifty-seven.

And your oratrix further alleges, that in committing the said agreement to writing, the stipulation that the notes for the four last payments were to bear interest was, by mistake, omitted; and the agreement, as written, is therefore silent in regard to interest on the deferred payments, though it was intended by your oratrix and also by the said Clagett, that the notes should bear interest, and that they should be so written. The said agreement, as written, is herewith filed as a part of this bill, marked "Exhibit A."

And your oratrix further alleges, that the said Clagett has taken possession of the said house and farm so purchased, and has paid the first payment of four thousand five hundred dollars on the purchase thereof.

But the said Clagett, not regarding his said agreement so made with your oratrix, but contriving and intending to deceive and defraud your oratrix in this behalf, has always hitherto delayed and refused to perform his agreement to give his notes bearing interest according to the stipulation entered into with your oratrix, but omitted by mistake in committing the same to writing; although your oratrix is ready and willing, and has always been ready, and has offered to give and tendered to the said Clagett a good and sufficient deed of the said property,

whenever the said notes, with interest, should be given to your oratrix by the said Clagett. And the said Clagett, amongst other things, pretends that, as the stipulation between him and your oratrix, to pay interest on the said notes, is not contained in the written agreement, that he is not bound by the stipulation; and is required only to give notes without interest for the last payments. But your oratrix is advised that this honorable court has the power to reform and rectify said written agreement so defective by omission and mistake, so as to make it conform to the true agreement entered into by your oratrix and the said Clagett, by inserting in it the clause alleged as aforesaid to have been omitted by mistake; and that, when the said agreement is so reformed and rectified, this honorable court has the power of enforcing a specific performance of the contract so reformed and rectified, by compelling the said Clagett to give his notes bearing interest to your oratrix, in accordance with the rectified agreement in writing.

To the end, therefore, that the said Clagett may answer the matters and things hereinbefore stated; and that the said agreement, as committed to writing, may be reformed and rectified by inserting in it the clause omitted by mistake, that the notes for the four deferred payments of the purchase money of the said house and farm, shall bear interest; and that the said Clagett may be decreed to give his notes bearing interest from the first day of April, eighteen hundred and fifty-seven, to your oratrix, in accordance with said rectified instrument of writing, and to accept from your oratrix a good and sufficient conveyance of the said house and farm; and that your oratrix may have such other and further relief as her case may require. (*Prayer for subpoena.*)

S. T.,

*Solicitor for complainant.*

### Final Decree.

KEMP	}	No. 2732 Equity.
vs.		In the Circuit Court for Frederick
CLAGETT.		County, as a Court of Equity.

This cause standing ready for hearing, and being submitted, the solicitors for the parties were heard, and the proceedings read and considered.

There can be no doubt that upon testimony strong enough to satisfy the court, the court has the power to rectify and reform a contract, when a mistake has been made in committing the contract to writing, and to decree a specific performance of the contract as amended. The only inquiry, therefore, in this case is, whether the testimony is such as to authorize the court to exercise the power of amendment, because of a mistake or omission proved in regard to the contract in question. The answer in the cause not being required to be on oath, is not evidence in the cause. The case, therefore must rest upon the testimony of Lewis G. Kemp, and as Lewis G. Kemp testifies, in the most positive manner, that the mistake or omission alleged in the bill to have been made in the contract, was made; and further testifies that the defendant Clagett admitted to him, Kemp, that the alleged mistake was made in committing the contract to writing, and that the real contract was such as the bill alleges it to be. If Kemp is to be believed, the mistake is proved, and the court is authorized to reform the contract by correcting the mistake. As there is no evidence in the cause to contradict Lewis G. Kemp, or to impeach his veracity, the court must consider the bill as proved, and must decree the contract to be reformed, and that the defendant shall perform the contract so reformed and amended, as prayed in the bill.

It is thereupon, this 24th day of January, in the year eighteen hundred and sixty, by Madison Nelson, judge in equity, and by the authority of this court, adjudged, ordered and decreed, that the contract or agreement between Rebecca C. Kemp and Grafton A. Clagett, filed in this case as Exhibit A, be, and the same is hereby reformed and amended by inserting and incorporating into the ninth line from the top, immediately after the word "notes," the words, "with interest from the first day of April, eighteen hundred and fifty-seven," so as to make the four back payments of the purchase money bear interest from the first day of April, 1857, according to the real contract proved in the cause. And it is further adjudged, ordered and decreed that the defendant, Grafton A. Clagett, make, execute and deliver to the executor of the said Rebecca C. Kemp, Lewis G. Kemp, a party now to this cause, four notes, each for eight hundred and seventy-five dollars, bearing interest from the first day of April, 1857, with security.

And it is further adjudged, ordered and decreed that, upon the delivery of the notes as aforesaid to the said Lewis G. Kemp, as executor, the said Grafton A. Clagett is entitled to a good and sufficient deed of conveyance of the land purchased by said articles of agreement from the said Rebecca C. Kemp;

and it is further adjudged, ordered and decreed that each party pay his own costs.

M. NELSON.

**Bill averring Fraud, and Asking that a Fraudulent Deed may be annulled.**

The bill of complaint of J. B., of \_\_\_\_\_, respectfully sheweth unto your honor, that P. F., of Baltimore City, was indebted to your orator in the sum of \_\_\_\_\_, current money, on his certain promissory note dated on or about the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, with interest thereon from the date thereof, and which, when overdue, the said P. F. neglected to pay, though often requested so to do. Therefore your orator threatened to bring suit against the said P. F. on the said promissory note. Whereupon the said P. F. conveyed away to one H. K., of Baltimore City, all his property, real and personal, for a pretended consideration, by a deed dated the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, a certified copy of which deed is herewith exhibited, marked "A," as a part of this bill of complaint.

And your orator further states, that at the time the said P. F. made the said deed to the said H. K., he was largely indebted, and had no means to pay his debts apart from the property so conveyed by him. That the said conveyance was fraudulently made, not *bona fide*, but for a mere simulated and pretended consideration, and was made to hinder, delay, and defraud your orator and the other creditors of the said H. K. of their just and lawful claims.

And your orator further states, that after the execution by the said P. F. of the aforesaid fraudulent deed to the said H. K., your orator brought suit on the aforesaid promissory note against the said P. F., in the \_\_\_\_\_ Court of Baltimore City, and on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, obtained a judgment against the said P. F. for \_\_\_\_\_, with interest from the said \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, and costs; and that, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, your orator issued a *fieri facias* on said judgment, and the same was delivered into the hands of the sheriff. All of which will appear by a short copy of said judgment and docket entries, under the seal of the court, marked "B," as a part of this bill.

To the end therefore that the said P. F. and H. K. may answer the said premises, and that the said deed from the said P. F. to the said H. K. may be declared void, and may be

vacated and annulled, and that your orator may have such further or other relief as his case may require :

May it please your honor to grant to your orator the writ of *subpoena*, commanding the said P. F. and the said H. K. to be and appear in this court, on some day to be named therein, to answer the premises, and abide by and perform such decree as may be passed therein.

S. T.,  
*Solicitor for complainants.*

**Bill by One Partner against Another for Dissolution of the Partnership, the Appointment of a Receiver, for an Injunction, and for General Relief.**

*To the Honorable* \_\_\_\_\_, *Judge of the Circuit Court of*  
*Baltimore City :*

The bill of complaint of A. B., of Baltimore City, respectfully represents that heretofore, to wit, on or about the day of \_\_\_\_\_, in the year \_\_\_\_\_, your orator entered into articles of partnership with one C. D., of the city aforesaid, for the purpose of conducting the grocery business in the city aforesaid, under the name and style of A. B. & Co. ; a copy of said articles of partnership is herewith filed, marked No. 1, as a part of this bill.

That by the express terms of said partnership, each partner is required to devote his whole time and attention to the business of the partnership, yet the said C. D. has, from the beginning of the partnership business, altogether neglected, and still neglects, to give any attention to the business of the firm, but leaves the business of the partnership entirely to the care and management of your orator.

That the said C. D. has, at different times, collected large sums of money from the debtors of the firm, for which no entries appear on the books of the firm, and has applied the same to his own individual use; and has refused to pay just debts due by the firm, though they were contracted by himself in the name of the firm.

That there are a large number of debts due to the firm that are in a course of collection by suits in courts, and your orator has reason to believe and to fear that the said C. D. will possess himself of the money so collected, or portions of it, without accounting to your orator for it, and will fraudulently use it outside of the partnership business for his individual profit. That the said C. D. has already abstracted, by his fraudulent dealings with the funds of the firm, a great deal more than his

share in the partnership would have been, even if he had accounted for all the funds which have come into his hands in the ways mentioned.

To the end therefore that the said C. D. may answer the matters and things hereinbefore stated fully and particularly, as if he were specifically interrogated as to each hereinbefore statement; and that a receiver may be appointed to take charge of the partnership books and papers of account, and the goods and effects, and to collect the debts due to the firm, and to preserve or dispose of the same under the direction of this court; and that the said C. D. may, by injunction, be restrained from selling, or disposing of, or retaining from the receiver appointed as aforesaid, any of the goods and effects of the partnership, or collecting any debts due thereto, or negotiating any bill or note, or contracting any debt whatsoever on account thereof, or intermeddling in any other manner with the business of the firm; and that the said partnership may be dissolved; and that your orator may have such other or further relief as his case may require:

May it please your honor to grant to your orator a writ of injunction against the said C. D., enjoining and strictly prohibiting him [*here insert the words of the prayer*]; and also the writ of subpœna, commanding him to appear in this court, at a certain day to be therein named, to answer the premises, and abide by and perform such decree as may be passed therein, and as in duty, &c.

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*Solicitor for complainant.*

### **Affidavit to accompany Bill.**

*Baltimore City, to wit:*

On this            day of           , in the year           , before me, a justice of the peace in and for said city, personally appeared the above named A. B., and made oath that the matters stated in the foregoing bill are true, to the best of his knowledge and belief.

### **Bill for Specific Performance.**

*To the Hon.           , Judge of the Circuit Court of*

The bill of complaint of T. B. respectfully shows, that a certain K. L. is possessed of a certain lot of ground, situate



, which is described in a deed to said K. L., a certified copy whereof is herewith filed, marked "A," as a part of this bill.

And so being owner of said property, the said K. L. contracted and agreed with your orator to sell the same to him for the sum of money, and upon the conditions and stipulations contained in the written agreement between them, which is herewith filed as a part of this bill, marked "B."

And your orator further shows, that in part performance of said agreement, he entered into possession of the said lot of ground, and made the first payment of the purchase money, amounting to , to the said K. L.

That your orator has since tendered to the said K. L. the balance of the purchase money, and is ready and willing to pay the same, but the said K. L. refuses to receive it.

Your orator avers that he has performed all the requirements of said agreement on his part to be performed, but that said K. L. refuses to make a conveyance of the property aforesaid to your orator, as he ought, in equity and good conscience, to do.

To the end therefore that a decree for the specific performance of said contract may be passed, and that your orator may receive a good and sufficient deed for the said lot of ground, according to the course of this court, and may have such further or other relief as his case may require :

May it please your honor to grant to your orator the writ of *subpœna*, &c.

**Bill for an Injunction to restrain the Defendant from prosecuting a Suit at Law against the Complainant, and also to restrain him from pleading a set-off to another Suit at Law by the Complainant against the Defendant.**

*To the Hon. Madison Nelson, Circuit Judge of the Third Judicial Circuit, sitting in equity for Frederick county :*

Your orator, Jacob Markell, of Frederick county, shows unto your honor, that heretofore, to wit, in the year 1852, your orator and a certain Francis Thomas, of Alleghany county, and Jacob M. Kunkel, of Frederick county, were jointly concerned as partners in certain lands lying and being in Alleghany county, in the State of Maryland, the *legal* title of which was in your orator. That the said Jacob M. Kunkel made certain payments and advancements out of his own individual funds in

relation to said lands and for the benefit of said partnership concerns. That among other payments and sums advanced by said Kunkel for said partnership, there were certain of them amounting to the sum of fifteen thousand and ninety-five dollars and ninety-five cents. That the said Kunkel, knowing the *legal* title in said lands to be in your orator as one of the partners, applied to your orator to recognize the said claim and secure its ultimate payment out of the said partnership lands and property by giving him a single bill or note under seal, for the payment of the same, and a mortgage on said lands, the *legal* title of which was in your orator. That at the time of said application it was well known to said Kunkel that said debt was on account of said partnership concern; that it was not the individual debt of your orator, but was solely a debt for and on account of said partnership of which he was one of the company; and said Kunkel well knew and so stated to your orator, that as the *legal* title to said land or property was in your orator as an individual, though the property was partnership property, and as your orator knew that said debt was due to him on account of said property, that he should execute and deliver a note or single bill to him, the said Kunkel, for the payment of said amount, and also a mortgage on said property to secure the payment of the same. That your orator knowing said facts, and not supposing that the said Kunkel would ever look to your orator individually to pay said note, but would treat it as a partnership transaction, to be paid out of the partnership property, and that his only reason for requesting said note and mortgage was to hold and bind the said partnership lands, and more specifically to show the precise amount of his said claims thus reduced into one aggregate sum, which said claims so paid by him were known to your orator to be correct; and your orator, supposing said Kunkel as a partner to be endeavoring merely to fix the amount of his claim against said partnership, the *legal* title of which property was in your orator; and that in no event was the said Kunkel to look to your orator to pay said sum, it being advanced on said partnership business and account by said Kunkel as one of the partners, and to be paid out of the said partnership capital, your orator agreed to execute and did execute a note to said Kunkel to pay said sum of fifteen thousand and ninety-five dollars and ninety-five cents, five years after date, with interest from the 8th day of April, 1852, the date of the note, payable quarterly; and your orator also executed and delivered to said Kunkel a mortgage on said lands of the partnership to secure the payment of said note.

Your orator further shows to your honor that the said partnership in said lands continued until the month of November,

1852, when your orator and the said Kunkel sold out their interests in the same to the aforesaid Francis Thomas; and all the partners entered into a written article of sale of the said lands to the said Thomas on certain terms therein specifically set forth. That by said terms of the sale Thomas was to pay said debt of fifteen thousand ninety-five dollars and ninety-five cents out of the purchase money.

Your orator further represents to your honor that at the time he and the said Kunkel sold out their interests as partners in the said lands and property, it was then expressly agreed and understood between your orator and the said Kunkel, in consideration of your orator suffering the said Thomas to pay over to said Kunkel or your orator's paying over to the use and benefit of said Kunkel, the sum of nearly eleven thousand dollars secured by a mortgage, that he the said Kunkel would look to the said Thomas and the proceeds of the lands of the partnership sold as aforesaid to the said Thomas, for the payment of the said note or single bill, and that he the said Kunkel was in no event to look to your orator for the payment of the said single bill or note out of his individual property or means. That in compliance with said agreement and understanding between your orator and the said Kunkel, he the said Kunkel did receive for his exclusive use and benefit the said sum of nearly eleven thousand dollars. And your orator further states that at the time he and the said Kunkel sold their interests as partners in said lands to the said Thomas, it was expressly agreed and understood by and between the said Kunkel, the said Thomas and your orator, that he the said Kunkel was to look to the said Thomas and the proceeds of said partnership property exclusively, and not to your orator, for all the money due to him, the said Kunkel, for or on account of his advances of money for said land and estate in Alleghany as aforesaid, and paid on account of said partnership dealings, the said fifteen thousand and ninety-five dollars and ninety-five cents being a part thereof. And your orator was on his part in like manner to look to said Thomas and the proceeds of said land for all the money to which he was entitled under said contract of sale to the said Thomas. And your orator further shows that said Kunkel was to receive the sum of three thousand dollars over and above the debts and interest due him on account of said partnership transactions as a *bonus* for money advanced, agreements entered into concerning the said property, the greater part of which he has actually received for his interest as a partner in said concerns. And your orator expressly states that said note or single bill and mortgage were given not to bind or to hold accountable or to be

paid by your orator out of his individual property in any even but solely for the purpose herein before set forth.

Your orator further states that after the execution of the said single bill and mortgage, and after the sale of the said partnership property to said Thomas as aforesaid, the said Kunkel in the year 1854, called on your orator to confess a judgment to him for the interest then due on said single bill, which he said was due and ought to be further secured by a judgment which would carry interest on its amount. Your orator, supposing that the object of said Kunkel was merely to secure the benefit of the *interest* on the *interest* due on said single bill, and that he was to be in no way *individually* answerable for said single bill or the interest on the same, agreed on the 14th day of October, 1854, that a judgment might be rendered up for said interest due on the 8th day of October, 1854, a copy of which said agreement and judgment rendered thereon is herewith exhibited marked (No. 1.) That some time after the rendition of said judgment the said Kunkel had a *fiery facias* issued on said judgment and placed in the hands of the sheriff, with direction to said sheriff to make the money on the same out of the individual property of your orator, as if it were his individual debt and not a partnership debt as hereinbefore set forth. Thereupon your orator filed a bill in equity in this honorable court, which is numbered on the docket of this honorable court 2759, against the said Kunkel and the sheriff, setting forth the facts hereinbefore stated, showing that your orator was not individually responsible for the money due on the judgment so confessed, nor for the sum due on the single bill for the interest on which the judgment had been rendered, and praying the court for an injunction against the said Kunkel and the sheriff, enjoining them from executing the said *fiery facias* against the goods of your orator, and from all further proceedings in law upon said judgment and *fiery facias*, and that the said Kunkel should answer the said bill upon his corporal oath. That the injunction so prayed was granted by this honorable court and still remains in force, restraining the execution of the *fiery facias* and all further proceedings at law on the judgment; and the said Kunkel has not answered the said bill, as he was summoned and commanded to do. A copy of said bill and injunction is herewith filed, marked (No. 2.)

Your orator further shows that notwithstanding the execution on the aforesaid judgment for the interest due on said single bill had been enjoined as aforesaid by this honorable court because of the facts in the bill showing that the single bill was not an individual debt of your orator, and the bill had not been answered by the said Kunkel, and the injunction against him

was still in force, the said Kunkel did, in virtual evasion of said injunction, on the 28th day of September, 1858, institute a suit against your orator on the said single bill for the fifteen thousand and ninety-five dollars and ninety-five cents for which it was given, as if it were the individual debt of your orator, and not a debt of the partnership as hereinbefore set forth. Said suit was docketed as No. 248 originals, October term, 1858, in the Circuit Court for Frederick county, as appears by a copy of the docket entries and proceedings herewith filed, marked (No. 3), and will stand for judgment on the docket of February term of said court, 1866.

Your orator further charges that the said land and partnership property which your orator and the said Kunkel sold to the said Thomas, and which was mortgaged as hereinbefore stated to pay said single bill, and it was agreed, as hereinbefore stated, should be looked to by the said Kunkel as alone to furnish the means of paying said single bill, has been sold by the said Thomas since the institution of the aforesaid suits against your orator by the said Kunkel, and the said sum due by the said single bill, and secured by mortgage and agreements as aforesaid to be paid out of the land and property, has been paid to the said Kunkel out of the proceeds of the sale of the said partnership property, so that the sum due by the said single bill is entirely paid and satisfied, and the said Kunkel has no shadow, even, of claim against any one, much less against your orator.

And your orator further shows, that your orator has brought a suit against the said Kunkel for two thousand dollars, on a note made by the said Kunkel and indorsed to your orator for valuable consideration; and that said suit will stand for judgment on the docket of the February term, 1866, of the Circuit Court for Frederick county; and your orator has reason to believe, and expressly charges, that the said Kunkel will, as your orator has no defense against it at law, attempt to use the said single bill of fifteen thousand ninety-five dollars and ninety-five cents by way of set-off against the claim upon which said suit is brought. A copy of the proceedings in said suit is herewith filed, marked (No. 4), which together with all the other exhibits your orator prays may be taken as a part of this bill.

Yet so it is, may it please your honor, that the said Kunkel, well knowing the hereinbefore facts stated, and that your orator is in no way directly or indirectly answerable or liable for the sum named in the aforesaid single bill, and never was so liable, has instituted the aforesaid suit on said single bill against your orator, and also, as your orator charges, purposes to use the said single bill as a set-off against the said suit which your orator has instituted against the said Kunkel as hereinbefore stated, know-

ing as he, the said Kunkel does, that your orator has no relief at law against the enforcing the said single bill against your orator, either in the suit which he has brought, or as a set-off against the suit which your orator has brought against him, your orator's only defense and relief being in your honorable court as a court of equity. All which actings and doings of said Kunkel are contrary to equity and good conscience, and tend to the manifest injury and loss of your orator.

To the end, therefore, that the said Jacob M. Kunkel may be perpetually enjoined from any further proceedings at law in the said suit instituted on the single bill against your orator for the fifteen thousand ninety-five dollars and ninety-five cents; and also be enjoined from setting off the said single bill against the said suit, claim or action instituted by your orator against the said Kunkel; and that the said Kunkel may answer on his corporal oath this bill of complaint, as if the same were here repeated and he interrogated specifically thereto; and that your orator may have all such other and further relief as the nature of his case and the rules of your court may allow, may it please your honor to order and direct the State's writ of injunction to be issued to the said Jacob M. Kunkel, enjoining him from further proceedings in the said suit against your orator, and from using the said single bill by way of set-off against the suit aforesaid which your orator has brought against the said Kunkel. And also to order and direct the State's summons to be issued and directed to the said Kunkel, commanding him to be and appear in your honorable court on a day to be therein named, to answer this bill of complaint, and to stand to and abide by such order and decree as your honor may pass in the premises. And as in duty bound, and so forth.

S. T.,

*Solicitor for complainant.*

*State of Maryland,* }  
*Frederick county,* } to wit:

On this            day of February, 1866, Jacob Markell, the complainant in the foregoing bill, appears before me, the subscriber, a justice of the peace of the State of Maryland, in and for Frederick county, and makes oath on the Holy Evangelists of Almighty God, that the several facts, matters and things set forth in the foregoing bill of complaint are true as therein stated, to the best of his knowledge, information and belief.

**Injunction Bond.**

Know all men by these presents that we, Jacob Markell, \_\_\_\_\_, all of Frederick county, in the State of Maryland, are held and firmly bound to Jacob M. Kunkel, of said county and State in the sum of \_\_\_\_\_, current money, to be paid to the said Jacob M. Kunkel, his heirs, executors and administrators, to which payment, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally, firmly by these presents, sealed with our seals and dated this \_\_\_\_\_ day of February, 1866.

Whereas, the said Jacob Markell is about to obtain from the Circuit Court for Frederick county, as a court of equity, an injunction to stay proceedings in a suit at law in the Circuit Court for Frederick county, brought by the said Jacob M. Kunkel against the said Markell, on a single bill for the sum of fifteen thousand and ninety-five dollars and ninety-five cents, brought to the October term, 1858, of said court, and still pending in said court; and also to restrain the said Jacob M. Kunkel from pleading, filing or using the said single bill as a set-off in a suit brought by the said Jacob Markell against the said Kunkel on a note for two thousand dollars, made by the said Kunkel and indorsed to the said Markell, in the Circuit Court for Frederick county, and still pending in said court.

Now the condition of the above obligation is such that if the said Jacob Markell shall prosecute the said writ of injunction with effect, and satisfy and pay the damages and costs which may be recovered from him in said suit, as well as all costs and charges that shall occur in the Circuit Court for Frederick county as a court of equity, and also any damages that may occur to the said Kunkel by reason of being restrained from using the said single bill as a set-off in the said suit, unless the Circuit Court for Frederick county, sitting as a court of equity, shall decree to the contrary, and shall well and truly in all things obey such order and decree as the Circuit Court for Frederick county, sitting as a court of equity, shall make in the premises, then the above obligation to be void, else to be and remain in full force and virtue.

In witness whereof, we have hereunto set our hands and affixed our seals, the day and year first hereinbefore written.

Signed, sealed and delivered }  
in the presence of }

[SEAL.]  
[SEAL.]

**An Amended or Supplemental Bill.**

The amended (or supplemental) bill of complaint of A., of \_\_\_\_\_, humbly shows, that heretofore he filed his bill of complaint in this court, against a certain B., of \_\_\_\_\_, praying, amongst other things, for a sale of certain premises mortgaged by the said B. to your orator, as in said bill is particularly set forth, to which bill the defendant answered, and other proceedings were had, as by the same proceedings now in this court, will appear.

And your orator has lately discovered, and now charges, by way of amendment (or supplement) to his aforesaid bill of complaint, that the said B., subsequent to the date of his aforesaid mortgage to your orator, conveyed or assigned all his remaining interest or equity of redemption in said premises unto one C., of said \_\_\_\_\_, who is therefore a necessary party to this suit.

To the end, therefore, that the said B. may answer this amendment, and that the said C. may answer as well the matters charged in the original bill of complaint, as in this amended bill; and that your orator may have such relief against them as is prayed by his original bill against the said B.:

May it please, &c. [*concluding with the usual prayer of process.*]

**Bill of Revivor by the Original Complainant, against the Executor of the Original Defendant, who had answered the Original Bill before his Death.**

The bill of complaint of A., of \_\_\_\_\_ county, humbly shows, that heretofore he filed his bill of complaint in this court, against a certain B., C. and D., praying, amongst other things, &c. [*here insert prayer of original bill in such manner as to show the right to revive against the executor of the deceased defendant.*] To which said bill the said defendant answered, and other proceedings were had, as by the same proceedings now remaining in this court will appear.

And your orator further charges, that before the said cause was brought on to a hearing, the said B. departed this life, leaving a last will and testament in writing, duly executed in his lifetime, of which he appointed E., of said county, executor; who, since the death of the said B., has duly proved the same and obtained letters testamentary thereon, and has possessed himself of assets of his testator sufficient to answer the demands of your orator against the said testator, as stated in his aforesaid original bill.

And your orator is advised that the said suit having abated



by the death of the said B., he is entitled to have the same revived against the said E., as executor aforesaid, and restored to the condition in which it was at the death of the said B.

To the end, therefore, that the said E. may answer the premises, and may either admit assets of his testator in his hands to satisfy your orator's aforesaid demand, or set forth a full and particular account of the personal estate of his testator which has come to his hands, and of the application thereof. And that the said suit may be revived against the said E., and be restored to the same condition that it was in at the time of the death of the said B. And in case the said E. shall not admit assets of his testator in his hands to satisfy your orator's aforesaid demand, that an account may be taken, under the direction of this court, of the estate and effects of the said testator, received by or for the use of the said E. as executor aforesaid, and of the application thereof :

May it please your honor to grant unto your orator the writ of subpoena against the said E., commanding him to appear in this court to answer the premises, and to show cause, if any he has, why this suit ought not to be revived against him as prayed, and as in duty, &c.

———, *Sol'r for Compl't.*

*NOTE.*—*The bill of revivor ought to pray that the executor may answer the original bill, as well as the bill of revivor, where the defendant dies without answering the original bill. Where one of several defendants dies, it is only necessary to file the bill of revivor against his representative. But where one of several complainants dies, the bill of revivor must be filed against all the defendants. By making slight alterations, the foregoing form may be adapted to all these cases.*

*When a decree becomes abated after it has been partly executed, a bill of revivor is proper ; and any decree, even where no subsequent proceedings have taken place, may be revived by such bill. But it is more usual in the latter case, to file a petition for a subpoena scire facias, as a more effectual remedy, according to the following form :*

### **Petition in the nature of a Bill of Revivor to revive a Decree.**

*To the, &c.*

The petition of A., of            county, executor of B., humbly shows that by a decree of this court, dated on or about the day of           , and passed in a cause wherein the said B. was complainant, and a certain C., of            county aforesaid was defendant, it was amongst other things adjudged, ordered and decreed, that the said C. forthwith pay or bring into this court, to be paid unto the said B., the sum of           , with interest from the            day of           , until paid or brought into court as aforesaid, together with his costs of said suit, to be taxed by the

register, as by the said decree now remaining in this court will more fully appear.

And your petitioner further charges that before the payment of the sum of money decreed to be paid as aforesaid, and before any proceeding had been taken in execution of said decree, the said B. departed this life, whereby said decree became abated.

That the said B., in his lifetime, duly made and published his last will and testament in writing, and made your petitioner the executor thereof, who has, since the death of his testator, proved the same, and obtained letters testamentary thereon, and he is advised that he is entitled to have the said decree revived against the said C.

He therefore prays that your honor will grant him a writ of *subpoena scire facias* against the said C., commanding him to appear in this court and show cause, if any he has, why the aforesaid decree ought not to be revived as prayed, and as, &c.

### Bill to Perpetuate Testimony.

BY A DEVISEE IN FEE IN POSSESSION TO PERPETUATE THE TESTIMONY OF THE WITNESSES TO A WILL.

*To, &c.*

Humbly complaining sheweth unto your honors your orator, T. H., of, &c., brother of the half blood and devisee named in the last will and testament of F. R., of, &c., deceased, that the said F. R. was in his lifetime, and at the time of his death, seized or entitled to him and his heirs of or to divers freehold estates, situate in the several places hereinafter mentioned, and divers other places, of considerable value in the whole, and being seized or entitled, and being of sound and disposing mind, memory, and understanding, he made his last will and testament in writing, bearing date, &c., which was duly executed by him in the presence of, and attested by, three credible persons whose names are [*here insert the names of the subscribing witnesses*], and which will, with the attestation thereof, is in the following words (that is to say) [*stating the will verbatim*]. And your orator further sheweth that the said F. R. afterwards, and on or about \_\_\_\_\_, departed this life without revoking or altering his said will, or any part thereof, whereupon your orator, by virtue of the said will, became entitled in fee simple to all his said freehold estates, subject as to such part thereof as aforesaid, to the payment of so much of the funeral expenses, debts and legacies of the said F. R., as his personal estate may

fall short to pay; and your orator accordingly, soon after the death of the said F. R., entered upon and took possession of all the said estates, and is now in possession and receipt of the rents and profits thereof, and in the possession and enjoyment thereof. And your orator well hoped that he and his heirs and assigns would have been permitted to enjoy the same quietly without any interruption from any person whomsoever. But now so it is, may it please your honors, that R. H., of, &c., who claims to be cousin and heir at law of the said F. R., alleging that he is the only or oldest son of M. H., and M., his wife, both deceased (which said M. H., as is also alleged, was the only brother of the father of the said F. R. who left any issue), combining and confederating with divers persons unknown to your orator, pretends that the said F. R. did not make such last will and testament in writing as aforesaid, or that he was not of sound and disposing mind and memory at the making thereof, or that the same was not executed in such manner as by law is required for devising real estates; and therefore he insists that your orator hath not any right or title to the real estates late of the said F. R., or any part thereof, but that on his death the same descended unto him, the said R. H., as his heir at law. Whereas your orator charges the contrary of such pretenses to be true. But, nevertheless the said R. H. refuses to contest the validity of the said will during the lifetime of the subscribing witnesses thereto, and he threatens that he will hereafter dispute the validity of the said will when all the subscribing witnesses thereto are dead, whereby your orator and his heirs and assigns will be deprived of the benefit of their testimony. All which pretenses of the said confederate are contrary to equity and good conscience, and tend to injure and oppress your orator in the premises. In consideration whereof, and forasmuch as your orator cannot perpetuate the testimony of the subscribing witnesses to the said will without the assistance of a court of equity.

To the end, therefore, that the said R. H. may show, if he can, why your orator should not have the testimony of the said witnesses perpetuated;

And that your orator may be at liberty to examine his witnesses with respect to the execution and attestation of the said will, and sanity of mind of the said F. R. at the making the same, so that their testimony may be perpetuated and preserved:

May it please, &c. [*Prayer for subpoena against R. H.*]

**Bill to take Testimony De Bene Esse.**

*To the Honorable the Judges, &c.*

Humbly complaining sheweth unto your honors your orator, A. B., of \_\_\_\_\_, that an action at law is now pending in the court of \_\_\_\_\_, wherein your orator is plaintiff, and C. D., of \_\_\_\_\_, is defendant [*or the reverse*], touching and concerning [*here describe the cause of action*], which has not yet been committed to a jury; and your orator further shows, that one E. F., of \_\_\_\_\_, of the age of seventy years or upwards [*or a person of infirm health, or laboring under a certain disease, or who is about to depart out of the jurisdiction of the court, or who is the sole witness to the fact of* \_\_\_\_\_], so that his testimony is in danger of being lost to your orator at the said trial, by reason of death [*or absence*], is a material and important witness for your orator, inasmuch as the said E. F. is acquainted with the fact [*here state the expected evidence of the witness*], (*or, inasmuch as the said E. F. is the sole person who has knowledge of the fact of* \_\_\_\_\_), which fact it is material and necessary for your orator to prove on the trial of the said action at law.

In consideration whereof, and forasmuch as your orator cannot be secure of having the testimony of the said witness at the trial of the said action, without the aid of a court of equity, in causing the same to be taken *de bene esse*, and that your orator may be at liberty to have the same so taken, under a commission, or commissions, issuing out of this honorable court. May it please your honors to grant unto your orator a writ of *subpœna* to be directed to the said C. D., thereby commanding him, at a certain day, and under pain to be therein limited, personally to appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and to show cause, if any he can, why your orator should not have the testimony of the said witness taken *de bene esse*.

NOTE.—*The above bill should be accompanied by an affidavit of the circumstances under which the evidence is in danger of being lost.*

**Bill of Review for Errors of Law apparent on the  
Decree itself.**

*To, &c.*

Humbly complaining sheweth unto your honors the plaintiff, A. B., of \_\_\_\_\_, that on the \_\_\_\_\_ day of \_\_\_\_\_, W. T., of \_\_\_\_\_, the defendant hereinafter named, exhibited his bill of complaint in this honorable court against the plaintiff, and

thereby set forth that [*here insert the original bill*]. And the plaintiff, being served with the proper process for that purpose, appeared and put in his answer to the said bill, to the effect following: [*here recite the substance of the answer*]. And the said W. T. replied to the said answer, and issue having been joined, and witnesses examined, and proofs closed [*or, the said W. T. joined issue on the answer, and*], the said cause was set down to be heard, and was heard, before your honors, on the       day of       , when a decree was pronounced, which was afterwards passed and entered, in which it was set forth and recited that it was at the hearing, on the plaintiff's behalf, insisted that the plaintiff had by his answer set forth that [*here insert the recital and decree*]. And the said decree has since, and on or about the       day of       , been duly signed and enrolled, which said decree, the plaintiff insists, is erroneous, and ought to be reviewed, reversed, and set aside for many apparent errors and imperfections, inasmuch as it appears by the plaintiff's answer, set forth in the body of said decree [*here insert the apparent errors*]. And no proof being made thereof, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed for the reasons aforesaid. In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, and there is no proof on which to ground any decree to set aside the said rent-charge, the plaintiff hopes that the said decree will be reviewed, reversed, and set aside, and no further proceedings had thereon.

To the end, therefore, that the said W. T., &c.; and that, for the reasons and under the circumstances aforesaid, the said decree may be reviewed, reversed, and set aside, and no further proceedings taken thereon, and the plaintiff permitted to remain in the undisturbed possession and enjoyment of the said rent-charge:

May it please, &c.

[*Pray for subpoena in usual form.*]

### **Bill of Review on Discovery of New Matter.**

Humbly complaining sheweth unto your honors the plaintiff, A. B., of       , that on or about       , C. D., of       , the defendant hereinafter named, exhibited his bill of complaint in this honorable court against the plaintiff, and thereby set forth that [*here insert the original bill*]. And the plaintiff, being duly served with process for that purpose, appeared and put in his answer to the said bill, to the effect following [*here state the substance of the answer*]. And the said C. D. replied

to the said answer, and issue having been joined, and witnesses examined, and the proofs closed [*or*, the said C. D. joined issue on the said answer, and], the said cause was set down to be heard, and was heard, before your honors, on the            day of           , when a decree was pronounced, whereby your honors decreed that the plaintiff's title to the premises was valid and effectual, after which the said C. D. petitioned your honors for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honors, on the ground of the said C. D. being the heir at law of the said E. F., deceased, and which said decree of reversal was afterwards duly signed and enrolled, as by the said decree and other proceedings now remaining filed as of record in this honorable court, reference being thereto had, will appear. And the plaintiff sheweth unto your honors, by leave of this court first had and obtained for that purpose, by way of supplement, that since the signing of said decree of reversal the plaintiff has discovered, as the fact is, that the said E. F. was in his lifetime seized in his *demesne* as of fee, of and in the hereditaments and premises in question in the said cause, and that the said E. F., while so seized, and when of sound mind, duly made and published his last will and testament in writing, bearing date on the            day of           , which was executed by him and attested according to law, and thereby gave and devised unto the said I. W., his heirs and assigns, forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause, to which the plaintiff claims to be entitled as purchaser thereof from the said I. W. And the plaintiff further sheweth unto your honors, that since the said decree of reversal was so made, signed and enrolled as aforesaid, and on or about the            day of           , the said C. D. departed this life intestate, leaving G. H., of           , the defendant hereinafter named, his heir at law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of the plaintiff. And the plaintiff is advised and insists that, under the aforesaid circumstances, the last-mentioned decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed; and that the first decree, declaring the plaintiff entitled to the said hereditaments and premises, should stand, and be established and confirmed; and for effectuating the same, the said several proceedings which became abated by the death of the said C. D., should stand and be revived against the said G. H. as his heir at law.

To the end, therefore, &c. And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary, and that the said last decree, and all proceed-

ings thereon may be reviewed and reversed, and that the said first-mentioned decree may stand, and be established and confirmed, and be added to, by the said will being declared a good and effectual devise of such hereditaments and premises, as aforesaid; and that the said G. H. may be decreed to put the plaintiff in possession of the said hereditaments and premises, and in the same situation, in every respect, as far as circumstances will now permit, as the plaintiff would have been in case said last decree had never been pronounced and executed; and that the plaintiff may have such other, &c.

May it please, &c.

[*Pray subpoena to revive and answer against the said G. H.*]

**Bill in the nature of a Bill of Review where a Party is Bound by a Decree.**

SUPPLEMENTAL BILL IN THE NATURE OF A BILL OF REVIEW.

[*Commence as in the preceding bill.*]

Whereby your honors decreed that, &c. [*state the effect of the decree*], as by the said proceedings and decree, now remaining as of record in this honorable court, reference being thereunto had, will appear. And the plaintiff further shows unto your honors [*state the supplemental matter by leave of the court, &c.*], that the said decree has never hitherto been signed and enrolled, and, in consequence of the discovery of such new matters as aforesaid, the plaintiff is entitled, as he is advised, to have the said cause heard thereon by your honors, when reheard on the said original bill, a petition for that purpose having been presented by the plaintiff, and acceded to by your honors, in the same manner as if such new matter had been put in issue in the said original suit.

To the end, therefore, &c. [*Interrogate as to supplemental matters.*]

And that the said will may be established and declared a valid and effectual devise of the said hereditaments and premises, and that the said cause may be heard on such new and supplemental matter as aforesaid, at the same time that it is reheard on the said original bill; and that the plaintiff may have such further and other relief as, under the circumstances hereinbefore particularly mentioned to your honors, shall seem meet, and the nature of his case, as it hereby appears, may require:

May it please, &c.

**Bill of Interpleader.**

In the Court, &amp;c. In Equity.

*To the, &c.*

Complaining shows unto your honor your orator, I. R., of the city of New York, merchant, that, on or about the      day of      , 1821, your orator purchased of D. T., a defendant hereafter named, a certain quantity of coal, then being on board a vessel called the      , amounting to      cauldrons, for which your orator agreed to pay the said D. T. the sum of \$      , and to give his promissory note for such amount, payable in      days from the said      day of      , 1821; that such coal was delivered to your orator, and he paid the account of such consideration money, \$      .

And your orator further shows, that, some time afterwards, and about the      day of      , 1821, F. & S. Schermerhorn, of the city of New York, merchants, caused an attachment to be sued out against one William Williams, as an absent debtor, and that afterwards L. F. and D. B. caused another attachment to be sued out against the said W. W. as an absconding debtor; that warrants were issued in the usual form to W. B., the sheriff of the county of New York, who gave notice to your orator not to pay over to any person except him, the said sheriff, any property or money of or belonging to the said W. W.; and further, that the said W. B., the sheriff aforesaid, and G. D., the attorney of the said F. & S. Schermerhorn, and the said F. & B., apprised your orator that the coal so purchased by your orator, as aforesaid, of the said D. T., was the property of the said W. W., for whom the said D. T. was only an agent or factor, and insisting and giving notice to your orator that he would be held liable if he paid the residue of such money, or any part thereof, to the said D. T.

And your orator further shows unto your honor, that he made application to the said F. & S. S., and F. & B., for leave to pay over such money to the said D. T., without subjecting himself to any responsibility therefor to them, the said F. & S. S., and F. & B., which they positively refused to do. And your orator also applied to the said D. T. to relieve or secure your orator against the effect or operation of such attachments, and from any further responsibility in the premises; but he, the said D. T., has wholly refused to do so, and has commenced an action at law in the Supreme Court of this State to recover the balance of the said money agreed upon as the price of said coal.

And your orator further shows, that he has always been willing to pay the balance of such money to such person or persons as should be lawfully entitled to receive the same, and to



whom he could pay the same with safety ; and he hereby offers to pay the same into this court.

And your orator further shows, that he doth not in any respect collude with either the said D. T., or F. & S. S., or F. & B., touching the matters in question in this cause ; that he has not exhibited this bill at the request of such defendants, or any or either of them, and that he has not been indemnified by such defendants, or any or either of them, but merely of his own free will, and to avoid being molested and injured, touching the matters contained in such bill. Wherefore, and as your orator can only have adequate relief in this court, to the end that the said defendants may interplead and settle their rights to the said sum of money, and that your orator may be at liberty to pay the same into this court ; and that the said D. T. may be enjoined and restrained from further proceeding in the suit at law, so, as aforesaid, commenced by him against your orator ; and that the said F. & S. S., and F. B., and D. T., may be enjoined and restrained from commencing any suit against your orator touching the premises ; and that your orator, upon payment into court of such amount, and procuring the said defendants to interplead according to the course of this court, may be decreed to be discharged from all liability to such defendants in premises, and may have all his costs therein :

May it please, &c.

#### **A Cross-Bill.**

Humbly complaining, sheweth unto your honors, your orator, J. H., of (administrator of all and singular the goods, chattels and credits, which were of R. H., late of , deceased, at the time of his death, left unadministered by M. H., late of , in her lifetime, now deceased, and which said M. H., in her lifetime, and at the time of her death, was administratrix of the goods, chattels, rights and credits, which were of the said R. H., deceased, at the time of his death), that J. M., late of , deceased, when in sound mind, duly made his last will and testament in writing, and thereby, after bequeathing several pecuniary legacies, gave the residue of his personal estate and effects (subject to the payment of his debts) to his daughter H., then an infant under the age of twenty-one years, but now the wife of J. C., of (and which said J. C. and H., his wife, are two of the defendants hereinafter named), and thereby appointed R. P., of (another defendant hereinafter named), and the said R. H., executors of his said will,

as by the probate copy of such will, reference being thereto had, will more fully appear. And your orator further sheweth unto your honors, that the said testator died on or about the day of            without altering or revoking his said will, leaving his said daughter H. him surviving; and upon or soon after his decease, the said R. P. and R. H., as such executors, as aforesaid, duly proved the said will in the proper court, and the said R. P., who principally acted in the execution of said will (the said R. H. having only interfered for the sake of conformity), under and by such probate, possessed himself of a considerable part of the said testator's personal estate and effects. And your orator further sheweth unto your honors, that the said R. H. departed this life on or about            ; and shortly after his decease, letters of administration were duly granted to the said M. H., his wife, who died on or about            ; and after her decease, such letters of administration of the unadministered personal estate of the said R. H., deceased, as aforesaid, were duly granted to your orator by the proper court; as by such letters of administration, reference being thereto had, will fully appear.

And your orator further sheweth unto your honors, that the said R. H., previously to his death, accounted for and paid to the said R. P., as such co-executor as aforesaid, all such part of the personal estate of the said testator as had been received by him, R. H., as such executor, as aforesaid, and no part of such personal estate remained in the hands of the said R. H. at the time of his decease, previously whereto the said R. H. resided in the country, where his house was robbed, and all papers (relative to his acts as such executor as aforesaid, and for which he had so accounted as hereinbefore mentioned) were stolen, and have never hitherto been recovered. And your orator further sheweth unto your honors, that the said J. C. and H., his wife, duly intermarried previously to the said H. attaining the age of twenty-one years, which she has since done, and after that period the said R. P. duly accounted for the residue of the said testator's personal estate with the said J. C. (who, in right of the said H., his wife, became entitled to receive the same), and thereupon obtained a general release from the said J. C. and H., his wife, of all demands in respect thereof, as by the said release, reference being thereto had, will appear. And your orator hoped, under the circumstances aforesaid, he would not have been called upon for an account of the administration of the said testator's personal estate.

But now, so it is, &c., the said J. C. and H., his wife, combining and confederating with the said R. P., and divers other persons at present unknown to your orator, whose names, when

discovered, your orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your orator in the premises, have lately filed their bill in this honorable court against your orator, as such representative of the said R. H., deceased, as aforesaid, for an account of the personal estate of the said testator, J. M., received by the said R. H., deceased, in his lifetime, as such executor as aforesaid, thereby praying that your orator may be decreed to pay the said J. C., in right of the said H., his wife, what upon such account shall appear to be due to the said J. C., in right of the said H., his wife, out of the assets of the said R. H.; and to which said bill they have made the said R. P. a defendant, without praying any account or relief against him. And they pretend that there are various receipts and accounts [*particularize those charged in the original bill*] of the said R. H., deceased, as such executor aforesaid, as to the personal estate of the said testator, which remained unaccounted for by the said R. H. at his decease, and which ought to be paid by your orator. Whereas your orator charges the contrary thereof to be true [*negative specifically the pretended receipts and accounts*], and that an account was stated, and a settlement of accounts took place between the said R. H. previously to his death, and the said R. P., and that an account has likewise been stated and settled by and between the said R. P., as such surviving executor as aforesaid, and the said J. C., in right of the said H., his wife, since she attained the age of twenty-one years as aforesaid; and that no demand was ever made on the personal estate of the said R. H., in respect of his accounts, until lately, when the loss of such papers as aforesaid was discovered, and of which your orator charges an undue advantage is intended and attempted to be taken; and your orator also charges that the said R. P. abets the said J. C. and H., his wife, in their proceedings, and refuses to indemnify the personal estate of the said R. H., in respect of his accounts in the execution of the will of the said testator, J. M., so accounted for by him, and settled with the said R. P. as aforesaid; and the said R. P. also refuses to inform your orator what he knows of the matters aforesaid, or any of them, and also denies such statements as have been made by him relative thereto. To the end, therefore, that the said J. C. and H., his wife, and the said R. P. and the rest of the confederates, when discovered, may upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated, and that not only as to the best of their respective knowledge

and remembrance, but also as to the best of their several and respective information and belief, and more especially that they may answer and set forth whether, &c. [*here follow the interrogatories to be answered.*]

And that the said J. C. and H., his wife, may be decreed to execute to your orator, as such administrator of the goods, chattels, and credits of the said R. H., deceased, left unadministered by the said M. H., also deceased, at the time of her death, a general release of all claims and demands upon such administered estate and effects of the said R. H., deceased, as aforesaid, in respect of all the accounts of the said R. H., in the execution of, the will of the said testator, J. M.; or that an account may be taken of the said personal estate of the said testator, J. M., received by the said R. H., and of his application thereof; your orator being willing and hereby offering to pay what, if anything, shall appear to be due on the balance of such account; and that the said R. P. may be decreed to indemnify the estate of the said R. H. and your orator, as such administrator thereof as aforesaid, in respect to such part thereof as the said R. P. paid to, or to the order, or for the use of the said R. P.; or otherwise to account for and pay the same to your orator. And that the said J. C. and H., his wife, may be decreed to pay to your orator his costs of this suit; and that your orator may have such further and other relief in the premises as the nature of his case may require, and to your honors may seem meet:

May it please your honors to grant unto your orator the most gracious writ of subpoena of the State of \_\_\_\_\_ (or of the United States of America), to be directed to the said J. C. and H., his wife, and the said R. P. and the rest of the confederates, when discovered, thereby commanding them and every of them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors may seem meet. And your orator shall ever pray.

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*Solicitor for Complainant.*

**Bill to Suspend a Decree.**

TO ENLARGE THE TIME OF PERFORMANCE OF A DECREE, ON THE  
GROUND OF INEVITABLE NECESSITY WHICH PREVENTED A  
PARTY FROM COMPLYING WITH THE STRICT TERMS OF IT.

Humbly complaining, sheweth unto your honors the plaintiff, A. B., of, &c., that the plaintiff, on the       day of       , borrowed the sum of       from C. D., of, &c., the defendant hereinafter named, and in order to secure to the said C. D. the repayment thereof, with legal interest, the plaintiff, by an indenture bearing date the       day of       [*set forth the mortgage*], bargained, sold and conveyed unto the said C. D. the real estate named and described in the said indenture, subject to redemption, on payment by the plaintiff of the said sum of       , and interest as therein mentioned, as by the said indenture, reference being thereto had, will more fully appear. And the plaintiff further sheweth that the said C. D., on or about       , exhibited his bill of complaint to this honorable court against the plaintiff, for payment of what was then due to him for principal and interest on the said security, by a short day to be appointed for that purpose, or that the plaintiff might be absolutely debarred and foreclosed from all right and equity of redemption in the said mortgaged premises; and the plaintiff having put in his answer thereto, and submitted to pay what should appear to be due from him, the said cause came on to be heard before this honorable court on or about       , when it was referred to R. V., one of the masters of this honorable court, to take an account of what was so due from the plaintiff to the said C. D. as aforesaid, and the plaintiff was ordered to pay the same on the       day of       , or be absolutely foreclosed of all right and equity of redemption in the said mortgaged premises, as by the said proceedings now remaining as of record in this honorable court, reference being thereunto had, will appear. And the plaintiff further sheweth unto your honors, that the plaintiff was duly prepared, and was ready to pay what should be reported to be due from him; but, before the said master made his report, the plaintiff was sent in great haste, by the commands of his majesty, ambassador to the court of Paris, on special and weighty affairs of State, which admitted of no delay; and the plaintiff was therefore unable to make any provision for the payment of what should be so found due from him as aforesaid. And the plaintiff further sheweth unto your honors, that the said master, during the plaintiff's absence, made his report, whereby he found that the sum of       was due to the said C. D. for principal and interest from the plaintiff, but no further proceedings have since been taken in the said cause.

And the plaintiff being ready and willing to pay the said sum of        to the said C. D., and all subsequent interest thereon, is advised, that on payment thereof, he is entitled, under the circumstances aforesaid, to have so much of the said decree as relates to the foreclosure of the plaintiff's right and equity of redemption in the said mortgaged premises, suspended, and on payment thereof, to have a reconveyance of the said mortgaged premises from the said C. D., &c. To the end, therefore, &c. And that the subsequent interest on the said sum of        so reported to be due from the plaintiff as aforesaid to the present time, may be computed by the direction of this honorable court, and on the payment of the said sum of        and interest as aforesaid, the said decree of foreclosure may be suspended, and the said C. D. directed, at the expense of the plaintiff, to reconvey the said mortgaged premises to the plaintiff, or as he shall appoint, freed from and absolutely discharged from the said mortgage [*And for further relief.*] May it please, &c.

### **Bill to set aside a Decree obtained by Fraud.**

BILL TO SET ASIDE A DECREE OF FORECLOSURE FRAUDULENTLY OBTAINED, AND FOR REDEMPTION.

Humbly complaining, sheweth unto your honors the plaintiff, N. B., of, &c., that T. B., of, &c., deceased, the plaintiff's late father, during his life, and on or about the        day of       , was seized in his demesne, as of fee, of and in the real estate hereinafter particularly described; and by indenture of that date, made between the said T. B., of the one part, and C. D., of, &c., the defendant hereinafter named, of the other part, the said T. B., in consideration of \$       , bargained, sold, and conveyed unto the said C. D., his heirs and assigns, all, &c. [*describe the mortgaged premises*], subject to redemption on payment of the said principal money and lawful interest at the time therein mentioned, and long since past; as by said indenture, reference being thereto had, will more fully appear. And the plaintiff further shows that the said T. B. departed this life on or about       , leaving the plaintiff his heir at law and only child, then an infant under twenty-one years of age; that is to say, of the age of seven years or thereabouts, him surviving. And the plaintiff further sheweth, that during the plaintiff's minority, on or about       , the said C. D. filed his bill of complaint in this honorable court against the plaintiff for a foreclosure of the plaintiff's right and equity of redemption in the said mortgaged premises; but the plaintiff was not represented in such bill to be an infant; and the said C. D. caused and procured one L. M.,

since deceased, who acted in the management of the affairs of the plaintiff's said father, to put in an answer in the name of the plaintiff, and without ever acquainting the plaintiff, or any of his friends or relations therewith; in which said answer a much greater sum was stated to be due from the plaintiff on the said mortgage security to the said C. D., than in fact was really owing to him, and for which it was untruly stated that the mortgaged premises were an insufficient security. And in consequence of such answer being put in, the said C. D. afterwards, in conjunction with the said L. M., on or about \_\_\_\_\_, obtained an absolute decree of foreclosure against the plaintiff, which the plaintiff has only lately discovered, and of which the plaintiff had no notice, and in which said decree no day is given to the plaintiff, who was an infant when the same was pronounced, to show cause against it when he came of age; as by the said proceedings, now remaining as of record in this honorable court, reference being thereto had, will more fully appear. And the plaintiff further shows that the plaintiff, on the \_\_\_\_\_ day of \_\_\_\_\_ last attained the age of twenty-one years, and shortly afterwards, having discovered that such transactions had taken place during his minority, as aforesaid, by himself and his agents, represented the same to the said C. D., and requested him to deliver up possession of the said mortgaged premises to the plaintiff, on being paid the principal money and interest, if any, actually and fairly due thereon, which the plaintiff offered, and has at all times been ready to pay, and which would have been paid by the personal representatives of the said T. B. out of his personal assets during the plaintiff's minority, had any application been made for that purpose. And the plaintiff hoped that the said C. D. would not have insisted on the said decree of foreclosure, so fraudulently obtained as aforesaid, but would have permitted the plaintiff to redeem the said mortgaged premises, as he ought to have done. But now so it is, the said C. D., &c., pretends that the said decree of foreclosure was fairly and properly obtained, and that a day was therein given to the plaintiff, when of age, to show cause against the same, and that the plaintiff has neglected to do so, and that the plaintiff is neither entitled to redeem, or to travel into the said accounts; whereas, the plaintiff charges the contrary thereof to be true, and that the plaintiff only attained the age of twenty-one years on the said \_\_\_\_\_ day of \_\_\_\_\_, and that he has since discovered the matters aforesaid by searching in the proper offices of this honorable court; and the plaintiff expressly charges that, under the circumstances aforesaid, the said decree, so fraudulently obtained as hereinbefore mentioned, ought to be set aside, and the plaintiff ought not to be precluded thereby, or in any other manner, from

redeeming the said mortgaged premises of which the said C. D. has possessed himself by such means as aforesaid. All of which actings and doings, &c. In consideration whereof, &c. To the end, therefore, &c.; and that the said decree of foreclosure may, for the reasons and under the circumstances aforesaid, be set aside by this honorable court, and declared to be fraudulent and void; and that an account may be taken of what, if anything, is now due to the said C. D. for principal and interest on the said mortgage; and that an account may be also taken of the rents and profits of the said mortgaged premises, which have, or without his willful default might have been, received by or on behalf of the said C. D., and if the same shall appear to have been more than the principal and interest due on the said mortgage, then that the residue thereof may be paid over to the plaintiff, and that the plaintiff may be at liberty to redeem the said mortgaged premises on payment of the principal and interest, if any, remaining due on said security; and that the said C. D. may be decreed, on being paid such principal money and interest, to deliver up possession of such mortgaged premises, free from all incumbrances, to the plaintiff, or as he shall appoint, and to deliver up all title-deeds and writings relating thereto. [*General relief.*] May it please, &c. [*Prayer for subpoena against C. D., &c.*]

### Bill to Carry a Decree into Execution.

WHERE A DECREE OF PARTITION HAS BEEN OBTAINED AND NOT EXECUTED.

Humbly complaining, sheweth unto your honors the plaintiff, A. B., of, &c., that the plaintiff, on or about the       day of       , filed his bill of complaint in this honorable court against E. B., stating [*set out substance of a bill of partition*], and praying [*set out prayer verbatim*]. And the plaintiff further sheweth, that due process having been served upon the said E. B., he appeared and put in his answer to said bill, to which answer a replication was filed [*or, on which answer issue was joined*]. And the said cause being duly at issue, the same came on to be heard, and was heard before your honors, on the       day of       , when your honors were pleased to order and decree that a commission should issue to certain commissioners to be therein named, to make partition of the estate in question, who were to take depositions of witnesses to be examined by them, in writing, and return the same with the said commission; and that the said estate was to be divided and separated, and one-third part thereof set out in severalty and



declared to belong to the said E. B. and his heirs; and the remaining two-thirds thereof declared to belong absolutely to the plaintiff, to be held in severalty by him; and the respective parties were decreed to convey their several shares to each other, to hold in severalty according to their respective undivided shares thereof; and that it should be referred to H. R., one of the masters of this court, to settle the conveyances, in case the parties differed about the same, as by the said proceedings and decree now remaining as of record in this honorable court, reference being thereto had, will more fully appear. And the plaintiff further sheweth unto your honors, that the commission awarded by the said decree never issued, on account of the said E. B. going abroad, and being until lately out of the jurisdiction of this honorable court; but the said E. B. having since returned, and the inconvenience mentioned in the plaintiff's former bill [*for partition*] still subsisting, the plaintiff is desirous of having the said decree forthwith carried into execution, but from the great length of time which has elapsed, and the refusal of the said E. B. to concur therein, the plaintiff is advised the same cannot be done without the assistance of this honorable court. To the end therefore, &c., and that the said decree may be directed to be forthwith carried specifically into execution, and the said E. B. ordered to do and concur in all necessary acts for that purpose:

May it please, &c. [*Prayer for subpoena against E. B.*]

### **Bill to restrain Infringement of Patent Rights.**

BILL FOR INJUNCTION TO RESTRAIN THE INFRINGEMENT OF A PATENT RIGHT, SETTING OUT RECOVERIES AT LAW AND IN EQUITY.

*To the Judges of the Circuit Court of the United States for the District of Massachusetts.*

IN EQUITY.

E. H., jr., of B., in the State of New York, and a citizen of the State of New York, brings this bill against C. W., of B., in the State of Massachusetts.

And thereupon your orator complains and says, that he being the original and first inventor of a new and useful improvement in sewing machines, fully described in the letters patent issued to him therefor, as hereinafter stated, and not known or used by others before his invention thereof, and not at the time of his application for letters patent therefor in public use or on sale, with his consent or allowance as the inventor; and being a

citizen of the United States, and having made due application, and having fully and in all respects complied with all the requisitions of the law in that behalf, did obtain letters patent therefor, issued in due form of law to him in the name of the United States, and under the seal of the Patent Office of the United States, and signed by N. P. T., acting Secretary of State, and countersigned by H. H. S., acting Commissioner of Patents, bearing date the tenth day of September, in the year of our Lord eighteen hundred and forty-six; whereby was granted and secured, according to law, to your orator, his heirs, administrators, or assigns, for the term of fourteen years from said date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement in sewing machines therein specified and claimed, as in and by said letters patent, or a certified copy thereof, here in court to be produced, will more fully appear.

And your orator further shows unto your honors, that certain assignments of certain rights in said patent have been made, and duly recorded in the Patent Office of the United States, whereby your orator, prior to the infringements herein complained of, became and now is the sole owner of said patent, as in and by said assignments, or certified copies thereof, here in court to be produced, will more fully appear.

And your orator further shows unto your honors, that the said improvement in sewing machines patented to him as aforesaid, has hitherto been in the exclusive possession of your orator or his grantees, and has hitherto been and still is of great value and profit to your orator; and that a license fee or patent rent, under his said patent, has hitherto been and still is paid to your orator for the largest portion of all the sewing machines manufactured and sold in the United States; yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right, and in violation of said letters patent and your orator's exclusive rights, secured to him as aforesaid, has made, used, or vended, and still does make, use, or vend to others to be used in said district, and in other parts of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each embracing substantially the improvement in sewing machines, or a material part thereof, patented to your orator as aforesaid; and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator, in and by his said letters patent.

And your orator further shows unto your honors, that heretofore the validity of his patent has been uniformly affirmed after severe and repeated contestation, namely, by a verdict and judgment thereon at law, in 1852; and by six final decrees in equity in the Circuit Court of the United States for the District of Massachusetts; and by one final decree in equity in the Circuit Court of the United States for the Southern District of New York, all obtained in favor of said patent prior to August, 1854.

And your orator further shows unto your honors, that the sewing machines made and sold by the defendant, as herein complained of, are in their essential parts and character, substantially like the sewing machines against which injunctions were obtained in the suits aforesaid by your orator, or by your orator and his then co-owner of said patent.

And your orator has requested the said defendant to desist from making, using, or vending to others to be used, the said sewing machines, embracing the said improvement patented to your orator, and to account with and pay over to your orator the profits made by said defendant by reason of the unlawful making, using, or vending of said sewing machines embracing said patented improvement of your orator. But now, so it is, may it please your honors, that said defendant has combined and confederated with other persons to your orator unknown, but whom, when discovered, your orator prays leave to make defendants hereto, to resist and destroy the exclusive rights and privileges secured to your orator as aforesaid, and to make, use, and vend said improvement in sewing machines patented to your orator as aforesaid, without the license of your orator, and in violation of his just rights in the premises, all of which is contrary to equity and good conscience.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may under oath, and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially may answer, discover, and set forth, whether during any and what period of time, and where he has made, used, and vended to others to be used, for any and what consideration, any, and how many sewing machines, and whether or not the same embraced the said improvement in sewing machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all

gains and profits realized from his unlawful making, using, or vending of sewing machines embracing said improvement patented to and vested in your orator as aforesaid, and may be restrained by an injunction to be issued out of this honorable court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid; and that the infringing machines now in the possession or under the control of the defendant, may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors seem meet:

May it please your honors to grant unto your orator not only a writ or writs of injunction conformable to the prayer of this bill, but also a writ or writs of *subpœna* to be directed to the said C. W. and confederates, when discovered, commanding him and them, at a certain time, and under a certain penalty therein to be limited, personally to be and appear before your honors in this honorable court, then and there to answer unto this bill of complaint, and to do and receive what to your honors shall seem meet in the premises.

E. H., JR.

### **Bill to Restrain the Infringement of Copyrights.**

A BILL TO RESTRAIN A PUBLICATION OF A "LIFE OF WASHINGTON," CONTAINING        PAGES, OF WHICH        PAGES WERE COPIED FROM SPARKS'S "LIFE AND WRITINGS OF WASHINGTON," PAGES BEING OFFICIAL LETTERS AND DOCUMENTS, AND PAGES BEING PRIVATE LETTERS OF WASHINGTON, ORIGINALLY PUBLISHED BY MR. S. (See 2 Story, 100.)

*To the Judges of the Circuit Court of the United States for the District of Massachusetts.*

The bill of complaint of C. F., T. G. W., and L. T., printers and publishers, and copartners, doing business under the name and style of F., W. and T., and J. S., gentleman, all of C., in the county of M., in said district of Massachusetts, and all being citizens of the United States, that the said J. S. is and heretofore, at the time of the infringement hereinafterwards mentioned, was proprietor of the copyright of a work of which the said J. S. is the author and compiler, entitled, "The Writings of George Washington, being his Correspondence, Ad-

dressess, Messages, and other Papers, official and private, selected and published from the original Manuscripts, with a Life of the Author, Notes and Illustrations, by J. S.," consisting of twelve volumes, of all which volumes respectively the copyright was taken out by said J. S. previous to the publication thereof respectively, and secured according to law, the said J. S., at the time of taking out and securing said copyrights respectively, and still, being a citizen of the United States, and the term of each and all of which copyrights has still more than eight years to run; and that said F., W. and T., before the infringement hereinafterwards complained of, had, by an agreement with said J. S., undertaken and become interested in and assumed a part of the risk and responsibility of the publication of said work, and have ever since continued, and still continue, to be thus interested, and that ever since the first publication of the several volumes of said work, the public have been supplied with copies of the same by said J. S., and the publishers of the same, at reasonable prices; and that said J. S. and said F., W. and T., have incurred very large expenses upon said publication, and have been and are in the receipt of large amounts, the proceeds of the sale of said work, to reimburse their expenses, and remunerate their labor and care bestowed upon the same. And your orators further show that they, your orators, being in the receipt of large sums, the proceeds of the sale of said work as aforesaid, under said copyrights, B. M., N. C., and T. H. W., all of B., in the county of S., in said district of Massachusetts, and G. P. L., of C., in the county of M., in the district of N. H., booksellers, being copartners under the name, style, and firm of M., C., L. and W., and also C. W. U., of S., in the county of E., in said district of Massachusetts, clerk, all of them well knowing that the said J. S. held such copyrights and said F., W. and T. were interested in the said publication, and deliberately, after due notice, intending to infringe said copyrights at said B., on the fifth day of August, in the year of our Lord eighteen hundred and forty, and at divers times before and since the said fifth day of August, without the allowance and consent of your orators, or either of them, published and exposed to sale and sold a work in two volumes entitled "The Life of Washington," in the form of an autobiography, the narrative being, to a great extent, conducted by himself in extracts and selections from his own writings, with portraits and other engravings, consisting of \_\_\_\_\_ pages in the whole, which they still continue to expose to sale, having had due notice, and well knowing that the same is a copy from, and an infringement and piracy of, said "Writings of George Washington, &c., with a Life of the Author," so published by your orators as aforesaid. And your orators aver, that three hundred and eighty-eight pages of said piratical work were

copied *verbatim et literatim* from the said work so edited and compiled by said J. S. as aforesaid, and so published by your orators as aforesaid, consisting of matter which was published originally by said J. S. under his said copyright, and which had never before been published or printed, and which he, the said J. S., and his assigns, had the exclusive right and privilege to print, publish, and sell and expose to sale; and that many other parts of said piratical work published by said parties complained of, besides said three hundred and eighty-eight pages, are infringements upon said J. S.'s copyrights, whereby your orators have sustained great damage, detriment and injury. And your orators further show that said M., C., L., and W. and U. still continue and threaten hereafter to continue to print, publish, and expose to sale and sell copies of the said piratical work, the protests, expostulations and warnings of your orators to them to the contrary notwithstanding. All which actings, doings, and pretenses are contrary to equity and good conscience, and tend to the wrong and injury of your orators in the premises. In consideration whereof, and forasmuch as your orators are remediless in the premises at law, and cannot have adequate relief save in a court of equity, where matters of this and the like nature are properly cognizable and relievable, and to the end that the said M., C., and W. and U. may appear and answer all and singular the matters and things hereinbefore set forth and complained of, particularly how many copies of said piratical work they have sold, and what number they have on hand; and that they be restrained, by injunction issuing from this court, from selling or exposing to sale, or causing or being in any way concerned in the selling or exposing to sale, or otherwise disposing of any copies of said piratical work, and that they be ordered and decreed to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiffs, and that they be ordered to surrender and deliver up the copies on hand and the stereotype plates of said piratical work to an officer of this court to be canceled and destroyed, and be ordered to pay the plaintiffs their costs; and that your orators may have such other and further relief as to this honorable court may seem meet or as equity may require—may it please this honorable court to grant to your orators a writ of *subpoena* directed to the said M., C., L. & W., and U., commanding them at a certain day, and under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer the premises, and to stand and abide such order and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

P. & R.

*By their solicitors.*     \

**Bill for an Account and an Injunction against the Illegal  
Use of a Trade-mark.**

*Circuit Court of the United States }  
for the District of . }*

*To the Judges of the Circuit Court of the United States for  
the District of in the Circuit, sitting as  
a Court of Equity.*

A. B. and C. D., of , and citizens of the State of , bring this their bill against E. F., of , and a citizen of the State of . And thereupon your orators, humbly complaining, show unto your honors, that they are the assignees and successors in business of & Co., a firm which was composed of and your orators, and which firm was formerly engaged in the manufacture and sale of sewing machines in ; and for the period of more than five years, your orators and their predecessors had been engaged in the manufacture and sale of sewing machines at the same place; and that during the whole period of time of such manufacture and sale by them, they had exclusively used, and your orators are now so using, and had, and still have, the right so to use, a certain trade-mark for said sewing machines, which trade-mark was printed on paper of an ultramarine ground on which is represented a view of the Princess Penelope weaving, and the name "Penelope," which is the essential part of said mark, printed thereon; and that no person, firm or corporation, except the said and your orators, have had at any time heretofore, and none except your orators now have any right to use the said trade-mark or any trade-mark essentially the same.

They further show to your honors that on the said day of , in the year , being entitled as aforesaid to the exclusive use of said trade-mark, and desiring to secure to themselves full and lawful protection for the same by due registration thereof in the United States Patent Office, according to law, your orators did deposit in said Patent Office of the United States for registration their trade-mark aforesaid for sewing machines; and having fully complied with all the requirements of the Act of Congress in such cases made and provided, the trade-mark aforesaid was on the day of , in the year , duly and lawfully registered and recorded in said United States Patent Office, with protection to remain in force for thirty years from said date, all of which, with an accurate copy and description of said trade-mark and the declaration of a member of the firm, on which it was registered, will more fully and at large appear from copies from the Patent Office, duly

certified by \_\_\_\_\_, commissioner of patents, under his seal of office, and herewith filed as a part of this bill, marked \_\_\_\_\_; and thereupon protection in the exclusive use of the trade-mark aforesaid previously held and enjoyed by your orators was secured to them for the period of thirty years from said \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_

Your orators further respectfully show unto your honors, that since your orators have had the exclusive right to use the said trade-mark, to wit, from the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ to the present time, the said \_\_\_\_\_, of \_\_\_\_\_ in the State of \_\_\_\_\_, has been manufacturing sewing machines in said city of \_\_\_\_\_, and has been unlawfully and without your orator's consent using, in the sale thereof, a trade-mark substantially like, and indeed almost identical with, that of your orators.

And your orators do further show that they hold and estimate their said trade-mark at the price and value of \_\_\_\_\_ thousand dollars; but cannot with certainty state the exact amount of their loss and injury, suffered by reason of said wrongful acts of the defendant, but believe the same to be the full sum of \_\_\_\_\_ thousand dollars, and do so charge the fact.

To the end, therefore, that your orators may obtain relief in the premises in this honorable court, where alone adequate relief can be afforded, they pray:—

1st. That the said E. F. may be made a defendant to this bill, and compelled to answer each and every allegation thereof, on oath, as fully and to the same extent as if he were directly and particularly interrogated as to each allegation.

2d. That he may be compelled to render, before a commissioner of this court, a full, true, and perfect account of all profits of every description which he has made, or might have made, by the use of the simulated trade-mark aforesaid, or by the use of any other trade-mark for sewing machines having thereon as a constituent part thereof the word "Penelope," or a representation of the Princess Penelope weaving, or any trade-mark having such near resemblance to that of your orators, as aforesaid, as might be calculated to deceive; and that he, the said E. F., be decreed to pay over to them all such profits.

3d. That the said commissioner be required to ascertain and report to this court, also, what loss and damage has been inflicted upon your orators by reason of the infringement of their rights, and the interference aforesaid with the right of exclusive use of the trade-mark first above mentioned; and that the said E. F. be also decreed to pay them such damages.

4th. And may it please your honors to grant unto your orators a restraining order against the said defendant, enjoining and restraining him, his clerks, attorneys, agents and servants



from using the simulated trade-mark aforesaid, or any other trade-mark containing the word "Penelope," or being substantially the same with that of your orators.

5th. And that your orators may obtain the relief prayed for, and all such further or other relief as the nature of their case may require, may it please your honors to grant to your orators the writ of subpoena against the said E. F., &c.

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*Solicitor for complainant.*

C. D. [for the Firm.]

*United States of America,* } ss.  
*District of* .

At the city of , in the county of , and district aforesaid, this day of , in the year , personally appeared before me , U. S. commissioner for said district, the above-named C. D., and made oath that the facts set forth in the foregoing bill, so far as they purport to be stated as of his own knowledge, are true; and so far as they purport to be stated on information and belief, he believes it to be true.

Given under my hand this day of in the year .

[L. s.]

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*U. S. Commissioner for*  
*District of* .

**Order to Show Cause why Injunction should not Issue  
on the foregoing Bill.**

*In the Circuit Court of the United States for the District  
of at .*

At chambers in vacation. A. B. and C. D., citizens and inhabitants of the State of , and partners under the firm and style of A. B. and C. D. *versus* E. F., a citizen and inhabitant of the city of , in the State of

This day came the complainants by C. D. and , their counsel, and presented to me , judge of the Circuit Court of the United States for the district of , at my chambers, in vacation, their bill of complaint against the defendant E. F.; and the same, with the affidavit of thereto annexed and the exhibits filed, being read and duly considered, on motion of said complainants by their counsel aforesaid, it is ordered, that the defendant do, on the of the special term of the Circuit Court of the United States for the district of , at , to be held on the day of ,

appear before said court and show cause, if any he have to show, why an injunction should not issue against him, and accounts be ordered, according to the prayer of said bill; such cause to be shown on said bill on affidavit, provided copies thereof be served on said defendant, with a copy of this order, on or before \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Judge, &c.

*Circuit Court of the United States* }  
*for the*                    *District of* . }

A. B. and C. D.  <i>vs.</i>  E. F.	}	<i>In Equity.</i>
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The answer of E. F., defendant, to the bill of complaint of A. B. and C. D., complainants.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, for answer thereto, or to so much and such parts thereof as this defendant is advised is material or necessary for him to make answer to, this defendant answering says: 1. That he has been informed and admits it to be true, that upon application by the complainants, registration was granted by the Patent Office of the United States on the day of \_\_\_\_\_, in the year 18\_\_\_\_, as in said bill alleged, of an alleged trade-mark as described in the said bill of complaint; and this defendant says he does not know and is not informed, save by said bill of complaint, whether or not the said complainants did properly make application for said registration of trade-mark, and did comply with all the requirements of law, and did have the said certificate of registration issued to them in due form of law. He leaves the complainants to make such proof thereof as they shall be advised is material. 2. And this defendant, on information and belief, denies that by virtue of any such registration of the said trade-mark in said bill mentioned, or otherwise, the said complainants became, or ever were, or either of them ever was possessed of any exclusive right to use the said alleged trade-mark in the said certificate of registration and bill of complaint described, if indeed the trade-mark and label used by this defendant is in any wise to be regarded as the same, either in substance or effect, with the said trade-mark claimed by the complainants. [&c., &c., &c.]

**Bill for Sale of Property under a Mechanics' Lien Law.**

*To the Honorable* , *the Judge of* .

The bill of complaint of , respectfully shows, that he contracted in the month of April, 1860, with a certain , to furnish for the erection of ten dwelling-houses, situate on street, in the city of . That he fulfilled the said contract and furnished the said , which were used in said buildings. That the same were to be paid for in cash on the completion of the said houses, and that the same were fully completed in , 1861. That the said claim is overdue; the said having frequently promised to pay the same, but has failed to do so. He further shows that he duly filed his claim as a lien against the said buildings and the grounds attached thereto, according to the law in such cases made and provided, in the court of city, which contains an accurate description of the location of said property. And he files herewith, as a part of this bill, a duly certified copy of said lien claim, whereby it appears that there is due to your orator the sum of dollars.

To the end, therefore, that the said may answer the premises, and that a decree may be passed by this court for the sale of the property aforesaid, that from the proceeds thereof the claim of your orator as aforesaid, with interest, may be paid; and that your orator may have such further or other relief as his case may require :

May it please your honor to grant unto your orator the writ of *subpœna*, &c.

\_\_\_\_\_,  
*Solicitor for Complainant.*

**Bill for the Enforcement of a Mechanic's Lien.**

*To the Honorable* , *Judge of the Circuit Court for Baltimore City.*

The bill of complaint of shows that your orator, early in the year , sold and delivered to , certain , which he used in building a certain house in the ; and that your orator afterwards and within months of the time of sale and delivery of the said , filed in the court of , his lien against the said house and the ground adjacent, to enforce the payment of for the aforesaid, a certified copy of which lien your orator files with this bill as a part thereof, marked "A."

To the end, therefore, that the said may answer the

premises, and that the property aforesaid and described in the lien may, by a decree of this court, be subjected to the payment of the said lien claim of \_\_\_\_\_, and interest from \_\_\_\_\_; and that your orator may have such further or other relief as his case may require:

May it please your honor to grant unto your orator a *sub-pœna* commanding the said \_\_\_\_\_ to be and appear in this court on a certain day therein named, to answer the premises and abide by and perform such order or decree as may therein be passed. And as in duty, &c.

\_\_\_\_\_,  
*Solicitor for Complainant.*

NOTE.—While each State has its own mechanics' lien law, and it is rarely identical in every particular with that of another State, yet all of them, having the same object in view, are in their main provisions so nearly the same, and in some instances are mere re-enactments of another, that a bill of complaint, with little modification, will answer in every State. For the law of mechanics' liens, see "The Law of Mechanics' Liens, by S. L. Phillips, 1874."

### **Bill Framed according to the Rules of the Supreme Court of the United States.**

*To the Judges of the Circuit Court of the United States, for  
the District of Massachusetts.*

I. W., a resident of the city of New York, and a citizen of the State of New York, an infant under the age of twenty years, by his father and next friend, T. W., a resident of the same city and a citizen of the same State, brings this his bill, against E. W. and R. W., who are both residents of the city of Boston, and citizens of the State of Massachusetts.

And your orator says, that one T. A., of the city of Boston, being seized and possessed of a considerable real and personal estate, did, on or about the fourth of March, 1820, duly make and publish his last will and testament in writing; and thereby, amongst other things bequeathed and devised to your orator, I. W., the sum of eight hundred dollars, and appointed the above-named E. W. and R. W., executors of his last will and testament. That the said testator departed this life on or about the twentieth of December, 1822, and soon after the death of the said testator, to wit, on the eighth of January, 1823, the defendants, E. W. and R. W., duly proved the said will in the probate court of the city of Boston, and took upon themselves the burden and execution thereof; and did, accordingly, possess themselves of the testator's real and personal estate, amounting to the sum of five thousand dollars, and upwards.

And your orator further says, that he has, by his father and

next friend, T. W., applied to the defendants, at various times since his said legacy became due and payable, to pay the same for your orator's benefit ; but they have positively refused to pay or secure for your orator's benefit the aforesaid legacy or any part thereof, pretending and alleging that the estate of the said testator, both real and personal, was insufficient to discharge his just debts, and that they have exhausted the whole of the estate which has come into their hands, in paying such debts ; whereas your orator charges, that the estate of the testator was of the value of five thousand dollars, as hereinbefore stated, and that his debts were small and of even trifling value when estimated by that amount. And your orator charges that the said defendants have converted the property of their testator to their own use, without making any satisfaction to your orator for his legacy hereinbefore mentioned.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer ; that is to say—

1. Whether it is not a fact that the said T. A. did duly make and publish his last will and testament, and therein bequeath to your orator a legacy of eight hundred dollars ?

2. Whether it is not a fact that the said T. A., in his last will and testament, appointed them, the said E. W. and R. W., to be executors of the same ?

3. Whether it is not a fact, that the said testator died without revoking said last will and testament, but in fact leaving the same in full force ?

4. Whether it is not a fact, that the said defendants, or one of them, proved the said will in the probate court of the city of Boston, in due form of law, and took upon themselves the execution thereof ?

5. Whether it is not a fact, that they have possessed themselves of the real and personal estate, goods, chattels and effects of the said T. A., deceased ?

6. Whether it is not a fact, that assets of said testator have come into their hands more than sufficient to discharge his just debts ?

7. Whether it is not a fact, that they, and each of them, have refused to pay the legacy bequeathed to your orator, and that it remains wholly unpaid ?

Your orator prays, that the said defendants may be compelled to render a full and perfect account of the estate, goods, chattels and effects of the said T. A., deceased, the value thereof, the debts due by said deceased, and to whom they have been paid or are payable, the debts due to said testator, and which of them have been paid to the said executors, and all other matters and things concerning the condition of said estate. And that this they may do upon their corporal oaths, to the best of their respective knowledge, information and belief.

You orator further prays, that the said defendants may be compelled to pay the legacy of eight hundred dollars bequeathed to your orator, by the testator, and that same may be placed at interest for the benefit of your orator, until he attains the age of twenty-one years, and then paid over to him. And that in the mean time the interest thereof be paid to your orator's father, to be applied by him to the support and maintenance of your orator. And that your orator may have such further or other relief as the nature of his case may require.

And your orator prays that your honors will grant unto your orator the writ of subpoena, issuing out of and under the seal of this court, to be directed to the said defendants, E. W. and R. W., commanding them and each of them, by a certain day, and under a certain penalty therein named, to appear before your honors, in the Circuit Court of \_\_\_\_\_, and then and there answer the premises, and abide the order and decree of the court.

—————, *Sol'r for Plff.*

NOTE.—The defendant E. W., and the defendant R. W., are each required to answer the interrogatories, numbered respectively, 1, 2, 3, 4, 5, 6, 7.

**In the Supreme Court of the United States. Bill by one State against another.**

*To the Supreme Court of the United States :*

The State of Missouri, by Robert A. Hatcher, her agent and attorney, duly appointed and commissioned in pursuance of law, states that a controversy has arisen between said State and the State of Kentucky, respecting the boundaries of said States, and the said State of Missouri complains, that said State of Kentucky, since the first of January, A. D. one thousand eight hundred and fifty-seven, has unlawfully claimed and exercised jurisdiction over Wolf Island, an island in the Mississippi river, forming part of the territory of said State of Missouri; that

said States are severally bounded at the point in question by the main channel of said river, and the said island was, at the time said boundaries were fixed, and still is, on the western or Missouri side of said channel.

Wherefore complainant prays, that said State of Kentucky may be made a defendant to this bill, and permitted to answer the same; that upon a final hearing of the cause, the boundary herein claimed may be ascertained and established by the decree of this court, and that the rights of possession, jurisdiction and sovereignty of said State of Missouri thereto be quieted, and the defendant forever enjoined and restrained from disturbing said complainant, her officers or people, in the full possession and enjoyment of the same; and the complainant prays such other and further relief as the nature of the case requires and to equity belongs; and complainant will ever pray, &c.

R. A. HATCHER,

*Ag't and Sol'r for Complainant.*

### Informations.

INFORMATION TO RESTRAIN THE MAKING A CARRIAGE-ROAD AND BREAKING UP A PUBLIC FOOTPATH, IN ORDER TO PREVENT CERTAIN STREETS FROM BEING MADE THOROUGHFARES FOR CARRIAGES, CONTRARY TO THE INTENTION OF A STATUTE.

*To, &c., in Chancery.*

Informing, sheweth unto your honors, C. J. R., of, &c., Esq., attorney general of the State of, &c., at and by the relation of A. B., &c., &c., against D. Y., &c., &c., that there is situate, lying, and being within the town of \_\_\_\_\_, a certain public street, called V. lane, leading from a certain other public street, called B. street, to a certain other public street, called G. street, and communicating on the north side thereof with certain other public streets, called C. street, Old B. street, and S. row. And the attorney general aforesaid, by the relation aforesaid, further sheweth, that at the east end of the said street, called V. lane, there is a certain other public street, called S. street, leading from thence into a certain other public street, called P. street, and that along the south of said street, called V. lane, from S. street to B. street, there is, and for years past has been, a common and public footpath, which has been from time to time paved with flag stones at the expense of the inhabitants of the said town of \_\_\_\_\_, for the convenience of persons passing and repassing on foot the said street called V. lane,

being a great public thoroughfare for foot passengers from B. street to S. street, although there is not, nor ever has been, any thoroughfare for carriages along the said street from B. street to S. street, by reason of certain wooden posts, which are, and ever since the making of the said street called V. lane, have been placed across the said street, a few feet to the eastward of S. row. And the attorney general aforesaid, by the relation aforesaid, sheweth that the said common and public footway from B. street to S. street, is and ever since the making of the same has been bounded on the south for the most part by a certain ancient brick wall, which forms the northern fence and boundary of certain lands called M. gardens and B. gardens; and that there is not, nor ever has been, any public way or opening on the north side of the said footway, so that the people of \_\_\_\_\_, in passing and repassing on the same footway, have at all times had the free and uninterrupted use thereof without any hurt, hindrance, or obstruction whatsoever. And the attorney general aforesaid, by the aforesaid relation, further sheweth, that upwards of \_\_\_\_\_ years since the then owners of the said lands called M. gardens and B. gardens, severally claimed a right to open a public street or way from P., through their respective lands into the said street called V. lane, and threatened to make a public street or streets accordingly, but such claim being resisted on the part of the proprietors and inhabitants of the said several streets, called V. lane, C. street, Old B. street, and S. row, by reason of the disturbance and injury that would thereby be occasioned to the said several streets, the said owners of the said lands thought fit to abandon such claim, and afterwards by an act of the \_\_\_\_\_, made and passed on the \_\_\_\_\_ day of \_\_\_\_\_, entitled "An act," &c., it was provided, &c., which provision was inserted in the said act for the purpose of protecting the said streets called V. lane, S. row, C. street, and Old B. street, from any thoroughfare for carriages from P. to the said street called V. lane, by way of S. street, or by any other means than by the way of B. street. And the attorney general aforesaid, and by the relation aforesaid, further sheweth, that said D. Y., proprietor of the said lands called M. gardens, and the defendant heretofore named, has formed a plan for making, and is about to make, a public street or way for horses, carts, and carriages, from P., through the said lands called M. gardens and the public street called V. lane, over the aforesaid common and public footway on the south side of the said street; and in and towards the execution of such plan has actually made an opening in the said ancient boundary wall, and has taken up a part of the flag pavement of the said footway. And the said attorney general, at the aforesaid relation, further



showeth, that such public street or way so intended to be made by the said defendant, D. Y., if carried into execution, will greatly interrupt and obstruct the said common and public footway on the south side of the said street called V. lane, and will be to the great damage and common nuisance of all the people of \_\_\_\_\_, passing and repassing by the said footway. And the attorney general aforesaid, at the relation aforesaid, further showeth, that such intended street, if carried into execution, will be opposite to the end of S. row, and westward of the said wooden posts so as aforesaid placed across the said street called V. lane, and by making a direct thoroughfare for horses, carts, and carriages from P., into the said street called V. lane, will actually defeat the provision made as aforesaid in the said act for the protection of the said streets, called V. lane, S. row, C. street, and Old B. street, from any thoroughfare for carriages, and will therefore be contrary to the true intent, meaning, and spirit of the said act.

To the end, therefore, that the said D. Y. may, according to the best of his knowledge, remembrance, information, and belief, &c.

## II. FORMS OF DEFENSES IN EQUITY.

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### **Demurrer.**

#### DEMURRER TO THE WHOLE BILL.

The demurrer of A., of                    county (*or* of B., an infant under the age of twenty-one years, by C., of                    county, the guardian; *or* of D., an idiot or lunatic, by E., of                    county, his committee or guardian; *or* of E. and F., his wife, of                    county; *or* of G., the wife of H., who has duly obtained leave to defend separately from her husband), to the bill of complaint of M., against the defendant (and others) in chancery exhibited.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained, to be true in manner and form as the same are therein set forth, doth demur thereto, and for causes of demurrer show :

#### 1. *General demurrer.*

That the said complainant hath not, in and by his said bill, stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

#### 2. *That the party has a remedy at law.*

That if the matters stated do give the complainant any cause of complaint against this defendant, the same is triable and determinable at law, and ought not to be inquired of by this court.

#### 3. *That the bill wants proper parties.*

That B., in the said bill of complaint named, is by the complainant's own showing, a proper and necessary party to any suit which may be brought against the defendant in this court, touching any of the pretended matters of equity charged in said bill.

#### *Conclusion.*

Wherefore, and for divers other errors and imperfections, this defendant demands the judgment of this court whether he

shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained; and prays to be hence dismissed with his reasonable costs in this behalf sustained.

### **Pleas.**

#### **I. PLEA TO THE PERSON IN ABATEMENT.**

The plea of A., of                    county (*or* of B., an infant under the age of twenty-one years, by C., of                    county, his guardian; *or* of D., an idiot or lunatic, by E., of                    county, his committee or guardian; *or* of E. and F., his wife, of                    county; *or* of G., the wife of H., who has obtained leave to defend separately from her husband), to the bill of complaint of M. against him in equity exhibited.

This defendant, by protestation, not confessing or acknowledging all or any part of the matters and things in the said bill of complaint contained, to be true, in manner and form as the same are therein set forth,\* for plea nevertheless to the said bill, doth plead and aver:

#### *Infancy of complainant.*

That the said complainant, at the time of filing his said bill, was and now is an infant under the age of twenty-one years, that is to say, of the age of                    or thereabout.

#### *Coverture of complainant.*

That the said complainant, at the time of filing her said bill, was and now is under coverture of one B., her husband, who is still living, and is in every respect capable, if necessary, of instituting any suit at law or in equity in this State in her behalf.

#### *Lunacy of the complainant.*

That the said complainant who, by himself alone, attempts to sustain an injunction in this suit, before and at the time of filing his said bill, was duly found and declared to be a lunatic, under and by virtue of a commission of lunacy, duly awarded and issued against him, as by the inquisition thereon (a true copy whereof is now in this defendant's possession, and ready to be produced to this honorable court), to which this defendant craves leave to refer, will more fully appear; and which said commission has not hitherto been superseded, and still remains in full

force and effect; and the said A. B., therein named, and the said plaintiff is, as this defendant avers, one and the same person, and are not other and different persons.

*Coverture of the defendant.*

That this defendant, at the time of filing the aforesaid bill, was and now is under coverture of one B., her husband, who is still living, and capable of defending this suit in her behalf.

*Conclusion.*

Wherefore, this defendant humbly prays judgment of this court whether he shall be compelled to make any further or other answer to the said bill of complaint, and prays to be dismissed with his reasonable costs and charges in this behalf sustained.

## II. PLEAS IN BAR.

The plea of, &c. [*as in the first form*], doth plead and aver.

*That the defendant never was administrator.*

That he is not, nor ever has been, administrator of the goods, chattels, rights or credits, which were of the said E., deceased, in the said bill named, as the said complainant in his said bill has untruly alleged.

Wherefore this defendant prays judgment of this court, whether he should be required to make any further answer to the said bill; and prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

*Plea of a former recovery.*

That heretofore, and before the complainant exhibited his present bill in this court, to wit, on the       day of       , the said complainant filed his bill of complaint in this court against this defendant, praying for a specific execution of the identical agreement which is set out in his present bill of complaint, by a decree requiring this defendant to convey unto the complainant the premises in the said agreement mentioned, upon payment by the said complainant to this defendant, of the sum of       , which is therein alleged to be the balance of the purchase money for the said premises, then due to this defendant, and being the same sum of money which is now alleged to be due on account thereof. To which said bill this defendant answered, and such other proceedings were had that afterwards, to wit, on the       .

day of \_\_\_\_\_, by a decree passed in the cause, it was adjudged, ordered and decreed, that the complainant's said bill of complaint be dismissed, and the complainant pay to the defendant his costs of suit, to be taxed by the register; as by the said decree, duly signed and enrolled in this court appears. All which matters and things\* this defendant doth aver and plead in bar of the complainant's present bill of complaint, and prays the judgment of this court, whether he shall be compelled to make any further answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

*Plea of a former suit depending.*

That heretofore, and before the said complainant exhibited his present bill in this court, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, the said complainant filed his bill of complaint in this court against this defendant, and also against \_\_\_\_\_, for the same matters and to the same effect, and for the like relief and purpose, as against this defendant, as the said complainant prays by his present bill; to which said bill this defendant answered, and other proceedings were thereupon had; and the said former bill and proceedings now remain depending in this court, and the said cause is yet undetermined and undismissed. All which matters and things, &c., &c. [*As in the last preceding form from the asterisk.*]

**Plea of a Release with averments negating fraud, &c.,  
and with an Answer to support the Plea.**

[*For the commencement, pursue the first form of a plea to the asterisk.*]

As to so much and such part of the said complainant's bill as seeks an account of the several dealings and transactions between the said complainant and this defendant previously and up to the \_\_\_\_\_ day of \_\_\_\_\_, and prays that the balance, if any, which shall be found due from this defendant upon taking such account, may be paid by him to the complainant, this defendant doth plead thereto, and for plea says:

That previously to the filing of the complainant's said bill, to wit, on the said \_\_\_\_\_ day of \_\_\_\_\_, the said complainant, in consideration of the sum of \_\_\_\_\_ then paid to him by this defendant, by a certain writing of release under his hand and sealed with his seal, which this defendant has ready to be produced in this court, did for himself, his executors and administrators, remise, release, and forever quit-claim unto this defend-

ant (among other things), the several matters and things in the said bill mentioned and complained of (and an account whereof is thereby sought against this defendant as aforesaid), and all suits and demands whatsoever, both at law and in equity, which the said complainant then had or might thereafter have in respect of the several dealings and transactions, matters and things, in the said bill mentioned, or any of them. And this defendant avers that the said release was freely, fairly and voluntarily given and executed by the said complainant on the day the same bears date; and that the said complainant well knew the nature and effect thereof previously to giving the same, and that the sum of \_\_\_\_\_, so paid by this defendant to the said complainant as aforesaid, was a full and fair equivalent for any demand which the said complainant could or might have against this defendant in respect of the several matters therein, and in the said bill also mentioned and every one of them. And therefore this defendant pleads the said release in bar to so much of the complainant's bill as is hereinbefore pleaded to, and prays the judgment of this court whether he shall be compelled to make any further answer to so much of the said bill as is hereinbefore pleaded to. And this defendant not waiving his said plea, but insisting thereon, for answer to residue of the aforesaid bill, and in support of his aforesaid plea, saith that he denies that the said release was unduly obtained by this defendant from the said complainant, or that the said complainant was ignorant of the nature and effect of such release, or that the consideration paid by this defendant to induce the said complainant to execute the same, was at all inadequate to the just claims and demands of the said complainant against this defendant in respect of the several dealings and transactions in the said bill mentioned, or any of them. And this defendant further denies, &c., &c.

——— *County, to wit:*

On this \_\_\_\_\_ day of \_\_\_\_\_, before the subscriber, a justice of the peace in and for said county [*or notary public, or other officer, according to the practice of each court*], personally appeared the within named A. B., and made oath that the several matters and things stated in the foregoing plea and answer are true to the best of his knowledge and belief.

**Plea of Purchase for Valuable Consideration without Notice, as to so much of said Bill as Prays a Discovery, &c., &c.**

[*Pursue first form to the asterisk*].

As to so much of said bill as seeks an account of what is due and owing to the complainant in respect of the annuity of \_\_\_\_\_, therein mentioned, and stated to be charged upon, and issuing out of the hereditaments and premises therein and hereinafter mentioned, this defendant doth plead thereto, and for plea saith:

That A. B., before and on the \_\_\_\_\_ day of \_\_\_\_\_, was or pretended to be seized in fee simple, and was or pretended to be in actual possession of the land and premises in the said bill mentioned, and in respect whereof relief is sought of this defendant, free from all incumbrances whatever; and this defendant, believing that the said A. B. was so seized and entitled, and that the said land and premises were in fact free from all incumbrances, on the \_\_\_\_\_ day of \_\_\_\_\_, agreed with the said A. B. for the absolute purchase of the fee simple and inheritance thereof; whereupon the said A. B., by his certain indenture of writing, dated on the \_\_\_\_\_ day of \_\_\_\_\_, and duly made and executed, in consideration of the sum of \_\_\_\_\_, paid to him by this defendant, granted, bargained, and sold unto this defendant all, &c., &c. [*Here particularly set out the parcels verbatim from the deed, and allege that they are the same premises mentioned and described in the bill.*] To have and to hold unto and to the use of this defendant, his heirs and assigns forever. And in the said indenture is contained a covenant from the said A. B. with this defendant, that the said A. B. was absolutely seized of the same land and premises, and that the same and every part and parcel thereof, were and was free from all incumbrances, as by the said indenture, reference being thereto had when the same shall be produced into this court, will appear. And this defendant avers that the said sum of \_\_\_\_\_, the consideration money in the said indenture mentioned, was actually paid by this defendant to the said A. B. at the time the said indenture bears date; and that at or before the respective times of the execution of the said indenture, and of the payment of the said purchase money, he, this defendant, had no notice whatever of the said annuity of \_\_\_\_\_ now claimed by the said complainant, or of any other incumbrance whatever, that in anywise affected the said land and premises so purchased by this defendant, or any part thereof.

All which matters and things this defendant doth aver and plead in bar to so much of the bill as is hereinbefore mentioned.

and prays judgment of this court whether he should make further answer thereto.

And this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, doth answer and say, that he had not at any time before, or at the time of purchasing the said land and premises, or since, until the complainant's bill was filed, any notice whatever, either express or implied, of the said annuity of \_\_\_\_\_, claimed by the said complainant, or that the same, or any other incumbrance whatever, was charged upon or in anywise affected the said land and premises so purchased as aforesaid, or any part thereof; and this defendant, &c., &c.

NOTE.—As this plea, like the one immediately preceding it, relies on matters in pais as a defense, it must be accompanied by a like affidavit of its truth.

### Plea of Stated Account.

[*Title and commencement as above.*]

As to so much and such parts of the said plaintiff's bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the said plaintiff and this defendant at any time before the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, this defendant for plea thereto saith, that on the \_\_\_\_\_ day of \_\_\_\_\_, which was previous to the said bill of complaint being filed, the said plaintiff and this defendant did make up, state, and settle an account in writing, a counterpart whereof was then delivered to the said plaintiff, of all sums of money which this defendant had before that time, by the order and direction and for the use of the said plaintiff, received, and of all matters and things thereto relating, or at any time before the said \_\_\_\_\_ day of \_\_\_\_\_, being or depending between the said plaintiff and this defendant (and in respect whereof the said plaintiff's bill of complaint has been since filed), and the said plaintiff, after a strict examination of the said account, and every item and particular thereof, which this defendant avers, according to his best knowledge and belief, to be true and just, did approve and allow the same, and actually received from this defendant the sum of \_\_\_\_\_, the balance of the said account, which by the said account appeared to be justly due to him from this defendant; and the said plaintiff thereupon, and on the \_\_\_\_\_ day of \_\_\_\_\_, gave to this defendant a receipt or acquittance for the same, under his hand, in full of all demands, and which said receipt or acquittance is in the words and figures



following (that is to say): [*here state the receipt verbatim*], as by the said receipt or acquittance now in the possession of this defendant, and ready to be produced to this honorable court will appear. Therefore, &c.

### **Plea of the Act of Limitations.**

That if the complainant ever had any cause of action or suit against this defendant for or concerning any of the matters in the said bill mentioned, which this defendant doth in no sort admit, such cause of action or suit did accrue or arise above *three years* before the filing of the said bill, or before serving or suing out process against this defendant to appear and answer said bill; nor did this defendant at any time within *three years* next before the said bill was exhibited, or process served on or issued out against this defendant, to appear to answer the same, promise, or agree to come to any account for, or to make satisfaction, or to pay any sum or sums of money for or by reason of the said matters charged in said bill. All which matters and things, &c., &c.

*NOTE.—Where the plea relies on the act of limitations simply, it may be put in without oath. But if there is any special matter charged in the bill to avoid the act, and which requires a denial by the plea, as in the foregoing form, then the plea must be sustained by an answer; and the plea and answer must be verified by affidavit. And in cases where the plea requires the support of an answer, the plea must not cover the whole bill, but only so much as does not relate to the discovery of the particulars and acts to which the plaintiff has a right to require an answer in support of the plea.*

### **Plea of the Statute of Frauds to a Parol Agreement as to so much of the Bill as seeks Discovery or Relief as to the Agreement.**

As to so much of said bill as seeks to compel this defendant to perform the agreement in said bill mentioned to have been made and entered into between the complainant and this defendant, for the sale by this defendant unto the complainant of a certain messuage or tenement in the bill mentioned, or as seeks to compel this defendant to execute a conveyance of such messuage or tenement to the complainant, pursuant to any such agreement, or as seeks any other relief relating to such messuage or tenement, or as seeks any discovery from this defendant concerning any agreement made or entered into between the complainant and this defendant, for sale by this defendant to the

complainant of the said message or tenement, and not reduced into writing, signed by this defendant, or some person by him thereunto lawfully authorized. For plea thereto this defendant says :

That neither this defendant, nor any person by him authorized, did ever sign any contract or agreement in writing for making and executing any sale or conveyance to the complainant of the land and premises in the bill mentioned and described, or any interest thereof, or to any such effect, or any memorandum or note in writing of any such agreement. All which this defendant doth aver and plead in bar to so much and such parts, &c., &c.

And this defendant not waiving his said plea, &c., &c.

*NOTE.—This is a pure plea of the statute. If the bill charges fraud, part performance, or any other circumstance, to avoid the operation of the statute, it will be necessary to negative such charges in the plea, and also by an answer in support of the plea. It must be verified by affidavit. (Form of Affidavit, ante, p. 592.)*

*NOTE.—Pleas to the jurisdiction of the court or disability of the person of the complainant, and pleas in bar of any matter of record, or of matters recorded or as of record in the court itself, or any other court, need not be upon oath. All other pleas, including pleas in disability of the person of the defendant, ought to be supported by the oath of the party that the matters contained in this plea are true to the best of his knowledge and belief. (Mitf. Ple. 389; Stor. Ple. 541; 3 Gill & John. 491; Cooper Ple. 332.)*

## PLEAS TO BILLS NOT ORIGINAL.

### **Plea to a Bill of Revivor.**

That the said plaintiff is not, as stated in the said bill of revivor, the personal representative of A. B., deceased, the testator therein named, and as such entitled to revive the said suit in the said bill of revivor mentioned, against this defendant; but the said plaintiff is the administrator only of C. D., late of, &c., deceased, who died intestate on the       day of       last, and was sole executor of the said A. B.; and that letters of administration of the goods and estate of the said A. B. unadministered by the said C. D. in his lifetime, have since the death of the said C. D. been duly granted by the proper court to E. F., of, &c., who thereby became, and now is, the legal personal representative of the said A. B. Wherefore the said defendant demands judgment of this honorable court, whether he shall be compelled to answer the said plaintiff's bill, and humbly prays to be dismissed with his reasonable costs in this behalf sustained.

**Plea to a Supplemental Bill.**

That the said matters and things in the said plaintiff's bill, stated and set forth by way of supplement, arose, and were well known to the said plaintiff before and at the time the said plaintiff filed his original bill in this cause, and that such said several matters and things can now be introduced, and ought so to be, if necessary, by amending the original bill. Wherefore, &c.

**ANSWERS.****Forms of Commencement and Conclusion of Answers.****COMMENCEMENT.**

*The title of a defense by answer to a suit in equity.*

The answer of \_\_\_\_\_, the defendant [*or*, one of the defendants; *or*, the joint and several answers of \_\_\_\_\_, the defendants *or*, two of the defendants], to the bill of complaint of \_\_\_\_\_, plaintiff *or* plaintiffs.

*By an infant.*

The answer of C. D., an infant under the age of twenty-one years, by L. M., his guardian, defendant to the bill of complaint of A. B., plaintiff.

*By husband and wife.*

The joint answer of A. B. and M. his wife, defendants, to the bill of complaint of C. D., the plaintiff.

*By wife separately under an order.*

The answer of C. B., one of the above-named defendants, and the wife of A. B., to the bill, &c.

In answer to the said bill, the said C. B., answering separately from her husband, in pursuance of an order of this honorable court, dated the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, authorizing her so to do, says as follows:

*By a lunatic or idiot.*

The answer of J. D., a lunatic [*or* idiot], by S. P., his guardian *ad litem*, to the bill of complaint of F. D., complainant.

*Where the bill misstates the names of the defendants.*

The joint and several answer of J. L., in the bill called R. L., and of C. E., in the bill called D. E., defendants, to the bill of complaint of A. B., plaintiff.

*Introduction, or words of course, preceding an answer.*

This defendant, now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, saith.

NOTE.—It is not usual to preface the answer with a formal introduction like the preceding, called a protestation; nor to conclude with a formal traverse like that which follows. But it is necessary that the forms of both the protestation and the traverse be given to complete the system of equity pleading.

*Conclusion, or formal traverse.*

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf sustained.

### **Form of Answer admitting the Complainant's Case.**

The answer of            to the bill of complaint of            , against him in this court exhibited.

This defendant admits the several matters and things charged in the complainant's bill to be true; and submits to such decree in the premises as may be right. And as, &c.

NOTE.—Where the answer admits the complainant's case, it is usually accepted without oath.

**Form of Affidavit.**

——— *County, to wit:*

On this       day of       , before the subscriber, a justice of the peace in and for said county, personally appeared the above-named       , and makes oath that the matters stated in the foregoing answer are true to the best of his knowledge and belief.

**Form of Affidavit where Complainant is Absent.**

——— *County, to wit:*

On this       day of       , before the subscriber, a justice of the peace in and for said county, personally appeared A. B., and made oath that he has read the foregoing bill and knows the contents thereof, and that the facts therein stated are true of his own knowledge; and that he makes the affidavit because the complainant is unavoidably absent, and therefore cannot make the affidavit himself.

NOTE.—*The above affidavits will serve as forms in all instances.*

**Commission to Examine Witnesses.**

*Maryland, &c.*

*The State of Maryland to A. and B., of       County, greeting:*

Know, that we have appointed you to be our commissioners to examine evidences in a cause depending in our High Court of Chancery, between C., complainant, and D., defendant. We therefore require you, having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to attend the execution of this commission, that at such time and place as to you shall seem convenient, you cause to come before you all such evidences as shall be named and produced to you by either the plaintiff or defendant; and that you examine them on their corporal oaths, to be by you administered upon the Holy Evangelists of Almighty God, touching their knowledge or remembrance of anything that may relate to the cause aforesaid; and that you cause notice to be given to the parties, or their attorneys, of the execution of this commission, before you execute the same; and having reduced the depositions of the witnesses so taken by you into writing, you send the same, with this our commission, close under your hand and seal, to us in our High Court of Chancery, with all convenient speed.

Witness the Honorable Theodorick Bland, Esq., Chancellor,  
this       day of       , Anno Domini       .

**Commissioner's Oath.**

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties, take the examination and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereto annexed, upon the interrogatories now, or which may hereafter, before the said commission is closed, be produced to and left with you by either of the said parties. So help you God.

**Clerk's Oath.**

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, and transcribe the depositions of all and every the witnesses produced before and examined by the commissioners named in the commission hereunto annexed, as far forth as you are directed and employed by said commissioners to take, write down, and transcribe the said depositions, or any of them. So help you God.

**Form of Interrogatories.**

A. C.	} <i>In Chancery.</i>
<i>vs.</i>	
B. D.	

Interrogatories to be proposed to witnesses, to be produced on the part of the complainant.

1. Are you or not acquainted with the parties to this suit, or either, and which of them?

If yea, how long have you known them, and each of them?

2. Are you or not acquainted with the handwriting of the defendant? If yea, look at the paper now shown you marked No. 1. Is or is not the signature "B. D.," thereto attached, in the handwriting of the said defendant? State any circumstances within your knowledge which may lead you to the opinion which you entertain on this subject.

3. Were you or not acquainted with one W., formerly a resident of \_\_\_\_\_ county? Is he dead or alive? If alive, where is he at this time? If dead, when and where did he die?

4. Was or was not the said W. married at the time of his death? If yea, who is his widow? and where does she reside?

5. Did or not the said W. leave children? If yea, state how many, and their sexes, names, ages, present places of residence, and condition of life.

NOTE.—With the above forms the practitioner can easily construct interrogatories suited to every case.

### Notice to the Parties.

A. C. vs. B. D.	}	<i>In Chancery.</i>
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Notice is hereby given to the parties, that the subscribers will attend at the house of \_\_\_\_\_, in \_\_\_\_\_, on Monday, the \_\_\_\_\_ day of \_\_\_\_\_, at 10 o'clock, A. M., for the purpose of opening and executing a commission from the Court of Chancery, empowering them to examine evidences in this cause.

Witness our hands, this \_\_\_\_\_ day of \_\_\_\_\_ ..

A.  
B.

\_\_\_\_\_ *County, to wit:*

On this \_\_\_\_\_ day of \_\_\_\_\_, before the subscriber, a justice of the peace in and for said county, personally appeared \_\_\_\_\_ and made oath that he served the within notice on the within named A. C., on the \_\_\_\_\_ instant, and on the within named B. D. on the \_\_\_\_\_ instant.

### Summons for Witnesses.

A. C. vs. B. D.	}	<i>In Chancery.</i>
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You are hereby summoned to appear before us, commissioners acting under a commission issued out of the Court of Chancery, and empowering us to examine evidences in this cause, on the \_\_\_\_\_ day of \_\_\_\_\_, at 10 o'clock, A. M., at the

house of \_\_\_\_\_, in \_\_\_\_\_, to testify on behalf of the complainant. Witness our hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_.

*NOTE.—As the commissioners have not the power to compel the attendance of the witnesses, application must be made by the solicitor to the court by petition, praying through the commissioners for an attachment compelling them to appear before the commissioners to testify.*

### Commissioners' Return.

At the execution of the annexed commission issued out of the Court of Chancery, and to us directed, and empowering us to examine evidences in the cause depending in the said court between A. C., as complainant, and B. D., as defendant—We, A. and B., commissioners therein named, having met on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_, pursuant to previous notice thereof given to the said parties, and taken the oath annexed to said commission, and having appointed H. our clerk, and administered to him the oath annexed to the said commission to be taken by him, did proceed then and there in the presence of the complainant, and of S., the solicitor for the defendant, to take the following depositions, to wit:

M., a witness of lawful age, produced on the part of the complainant, being duly sworn and examined to interrogatories filed with the commissioners by the complainant, and herewith returned, deposes and says:

To the first interrogatory, that he is acquainted, &c.

To the second interrogatory, that he is, &c., &c.

Whereupon the counsel for the defendant exhibited cross-interrogatories to be put to said witness, which are herewith returned, and the said witness being examined thereon deposes and says:

To the first interrogatory, &c., &c.

There being no other witnesses to be examined, and neither party desiring further time for the production of his evidences, the commissioners closed the said commission, and herewith return the same under their hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_.

A. [SEAL.]

B. [SEAL.]

*NOTE.—After closing the commission, it ought to be put into an envelope, together with the interrogatories and depositions and all documents left with the commissioners by the parties, and sealed up, and thus indorsed:*

The execution of this commission appears by certain schedules thereunto annexed.

A. [SEAL.]  
B. [SEAL.]



**Petition for a Return of a Commission.**

A. C.

vs.

B. D.

} *In Chancery.**To the Honorable Chancellor of Maryland.*

The petition of A. C., the complainant, humbly shows that on the            day of           , a commission was issued to A. and B., of            county, authorizing them to examine evidences in this cause. That said commission has been opened and testimony taken thereunder, and that it has been outstanding for more than *six months* from the issuing thereof. Your petitioner therefore prays that the said commissioners may be directed forthwith to return the said commission with their proceedings. And as, &c.

**Order passed on the Petition***In Chancery. This            day of           .*

Ordered, that the commissioners named in the foregoing petition return the commission directed to them, with their proceedings thereon, before the first day of next term.

**Petition for Remanding Commission.***... The petition, &c.*

That heretofore a commission was issued to A. and B., of            county, to examine evidences in this cause, which was executed and returned into this court, on the            day of           . That your petitioner has lately discovered that his proofs taken under said commission are defective in this, that he has not proved the execution of his exhibit B, by the parties thereto. That this defect was occasioned by an accidental oversight, and can be easily removed, as there are several witnesses within reach of your petitioner by whom he can prove the fact. And he avers that in making this application, he has no design to delay the hearing of the cause. He therefore prays that your honor will remand the former commission, or issue a new commission to the persons before named, to examine evidences in the cause. And as, &c.

NOTE.—*This petition should be verified by the oath of the petitioner.*

**Order on the Petition.**

*In Chancery, on the                      day of                      .*

Ordered, that a new commission issue to A. and B., as prayed by the within petition; but the hearing of the cause shall not be delayed thereby, unless a continuance shall be granted by the opposite party.

*NOTE.—Foregoing is the full regular procedure in equity for taking testimony under a commission issued for that purpose.*

**Order for a Feigned Issue.**

*[Title of cause.]*

This cause having been brought on to be heard upon the pleadings filed and the proofs taken therein, and the said pleadings and proofs having been read, and Mr. S. W., of counsel for the complainant, and Mr. F. K., of counsel for the defendant, having been heard, it is ordered, adjudged, and decreed, and this court by virtue of the power and authority thereof, doth order, adjudge and decree, that a feigned issue be formed and tried between the parties by a jury of the country, at the next circuit court to be held in and for the county of Saratoga, on the first Monday of January next, to inquire and determine whether the deed mentioned in the pleadings in this cause, bearing date the                      day of                      , 1840, and purporting to have been executed by J. H. and E. his wife, to the complainant, was executed by the said J. H. and E. his wife; and whether the same was delivered by the said grantors to the grantee therein. And it is further ordered that the solicitor for the complainant in this suit do make up the said issues, and serve a copy thereof upon the defendant's solicitor without unnecessary delay; that unless the form of such issues shall be agreed upon by the solicitors for the respective parties within ten days after such service thereof, then that it be referred to one of the masters of this court residing in the county of Saratoga to settle the said issues and to report the same to this court. And it is further ordered, adjudged and decreed, that on the trial of the said feigned issues either party is to be at liberty to examine any witnesses whose testimony was read upon the hearing of this cause, or to read their depositions heretofore taken, if they are dead, or out of the jurisdiction of the court. And either party is also to be at liberty to read the deposition of any witness of the opposite party which was read on the

hearing of this cause. That the said issues be so framed that the complainant in this cause may hold the affirmative of the several questions above stated; and he is to be at liberty to open and close the argument on the trial. Either party is to be at liberty to notice the cause for trial; and neither party is to be at liberty to put it off without sufficient cause shown, and on the usual terms. And all further directions are reserved until after the trial of the said issues.

### **Declaration upon a Feigned Issue.**

#### *Supreme Court.*

Of October term, in the year one thousand eight hundred and forty-three.

#### *Saratoga County, ss.:*

John Doe, plaintiff in this suit, by J. E., his attorney, complains of Richard Roe, defendant in this suit, of a plea of trespass on the case upon promises. For that whereas, on the day of \_\_\_\_\_, in the year one thousand eight hundred and forty-three, at Saratoga Springs, in the county aforesaid, a certain discourse was moved and had, by and between the said John Doe and the said Richard Roe, of and concerning a certain paper writing, purporting to be a deed of conveyance of the lands therein described, from J. H. and E. his wife to A. B., and bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 1840; and which said deed or paper writing is set forth and described in the pleadings in a certain cause depending in the Court of Chancery of the State of New York, wherein A. B. is complainant and C. D. is defendant; and upon that discourse a question then and there arose and was debated between the said John Doe and the said Richard Roe, whether the said deed or paper writing was executed and delivered by the said J. H. and E. his wife. And upon such discourse the said John Doe then and there asserted and affirmed that the said deed or paper writing above mentioned was executed and delivered by the said J. H. and E. his wife; which assertion the said Richard Roe then and there denied to be true, and asserted to the contrary thereof; and thereupon afterwards, to wit, on the same day and year first above mentioned, at the place in the county aforesaid, in consideration that the said John Doe, at the special instance and request of the said Richard Roe, had then and there paid to the said Richard Roe the sum of one hundred dollars, lawful money, he the said Richard Roe, undertook, and then and there faithfully

promised the said John Doe, to pay him the sum of one hundred dollars, like lawful money, in case the said deed or paper writing was executed and delivered by the said J. H. and E. his wife, as he the said John Doe had asserted as aforesaid. And the said John Doe, in fact, saith, that the said deed or paper writing was executed and delivered by the said J. H. and E. his wife, as he the said John Doe had asserted and affirmed, to wit, on the day and year, and at the place in the county aforesaid, undertook, and then and there faithfully promised the said John Doe to pay him the said sum of money, when he the said Richard Roe should be thereunto afterwards requested. Nevertheless, the said Richard Roe, not regarding his said promise and undertaking by him in form aforesaid made, hath not as yet paid to the said John Doe the said sum of one hundred dollars, or any part thereof, although so to do the said Richard Roe was requested by the said John Doe afterwards, to wit, on the same day and year last aforesaid, and often afterwards, to wit, at the place in the county aforesaid; but to pay the same to the said John Doe the said Richard Roe hath hitherto altogether refused, and still doth refuse, to the damage of the said John Doe, of one hundred dollars, and therefore he brings this suit, &c.

J. E.,

*Plaintiff's Atty.*

### **Plea upon a Feigned Issue.**

[*Title of cause.*]

And the said Richard Roe, by H. W., his attorney, comes and defends the wrong and injury, when, &c., and says, that the said John Doe ought not to have or maintain his aforesaid action thereof against him, because he says that though true it is that the said discourse was had and moved by and between the said John Doe and him the said Richard Roe, wherein the question did arise as aforesaid, and that he, the said defendant, did undertake and promise, in manner and form, as the said John Doe hath above in that behalf alleged; nevertheless, for plea in this behalf, the said Richard Roe saith that the said J. H. and E. his wife did not execute and deliver the said deed or paper writing in the said plaintiff's declaration mentioned, at the time in that behalf mentioned in the said declaration, nor at any other time; and of this he, the said defendant, puts himself upon the country, and the said plaintiff doth the like, &c.

H. W.,

*Defendant's Atty.*

**Notice of Hearing on further directions after Trial of Feigned Issue.**

[*Title of cause.*]

*Sir:* Take notice that this cause will be brought to a hearing for further directions upon the pleadings in the feigned issue framed therein, and upon the certified copy of the minutes of the trial of such feigned issue, annexed thereto, and filed in the office of the register of this court, at the next term of this court, to be held at the Capitol in the city of Albany, on the day of January next.

Dated Dec. , 1843.

Yours, &c.

To H. W., Esq., }  
Sol. for Def't. }

J. E.,  
Solicitor for Complainant.

NOTE.—*In the State of Maryland the form of proceeding is more simple, and may serve as a pattern of the more simple modern practice.*

*An order is passed in the usual form, "that the following issues be tried before a jury of            county, under the directions of            county court, viz. :*

"1. Whether, &c.

"That upon the trial of said issues the complainant in this cause shall be plaintiff and the defendant here shall be the defendant. And that the plaintiff shall be at liberty to read to the jury the deposition of, &c., and that the defendant, upon said trial, shall admit, &c. And the honorable judges of county court are respectfully requested to instruct the jury in relation to any question of law which may arise on the trial of the said issues."

**General Form of Demurrer, Plea, and Answer,**

WHEN USED TOGETHER AS A DEFENSE TO SEPARATE PARTS OF THE BILL.

*In Chancery. Between, &c.*

The demurrer, plea, and answer of A. B., the above-named defendant [*or one of the above-named defendants*], to the bill of complaint [*or amended bill of complaint*] of the above-named plaintiff.

(1) *Demurrer.*] The defendant, A. B., by protestation, not confessing or acknowledging all or any of the matters and things in the said bill contained to be true, in such manner and form as the same are therein set forth and alleged, as to so much

of the said bill as seeks [*state what*], and also as to so much of the said bill as seeks, &c., does demur thereto.

And as to the discovery and relief sought by the said bill, save so much thereof as relates to the premises therein mentioned to be situate at S., in the county of D., for cause of demurrer, the defendant shows that, &c.

And as to so much of the said discovery and relief as relates to the said premises at S. aforesaid, for cause of demurrer he shows that, &c.

Wherefore, and for divers other good causes, appearing in the said bill, the defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to such parts of the said bill as he has hereinbefore demurred to.

(2) *Plea.*] And the defendant, A. B., not waiving his said several demurrers, but wholly relying thereon, as to so much of the said bill as seeks, &c., and also as to so much of the said bill as seeks, &c., does plead thereto; and for plea says that, &c.; and does aver that, &c.

All which last-mentioned matters and things the said defendant does plead in bar to so much of the said bill as is hereinbefore pleaded to; and he humbly prays judgment of this honorable court whether he ought to make any further answer to so much of the said bill as is hereinbefore pleaded to.

(3) *Answer.*] And the defendant, A. B., not waiving his said several demurrers and plea, but wholly relying and insisting thereon, for answer to so much of the said bill as he is advised it is material or necessary for him to make answer unto, says as follows, &c.

[*Name of Counsel.*]

### Of Making all Defenses by Answer.

NOTE.—*In the Dissertation on Equity Pleading prefixed to this edition of Mitford, it is shown that defenses by pleas and demurrers are not so much encouraged in modern practice as the making all defenses by answer. In such answer a defense is not set out with all the special circumstances which would be deemed necessary in a plea. And in some cases such mode of making defense may be more convenient and economical, and more conduce to dispatch in the final disposition of the cause; but at the same time, as is shown in the dissertation just mentioned, it has confused the system of pleading, and should be used with caution and intelligent discrimination of the special function of each form of defense. The following is the form of an answer, embracing all matters of defense applicable to the case in which it was used. It will serve as a model in framing such an answer, accommodated to the varying circumstances of each case:*

**Form of Making all Defenses by Answer.****AN ANSWER TO A BILL FOR AN INJUNCTION TO STAY PROCEEDINGS  
AT LAW ON A JUDGMENT.**

This defendant admits that, at                      term of                      court, he recovered a judgment against the complainant for the sum of                      , being the amount due him, as the holder of certain promissory notes, mentioned and described in the bill of complaint, as drawn by the said complainant, payable to one B., and by him indorsed to this defendant. And as the said judgment was recovered without any fraud on his part, &c., it remains in full force and unreversed; and as all the objections now pretended against it in said bill were inquirable into at law, and if shown to be true, might have been used as defenses in his aforesaid action at law, this defendant relies on his aforesaid judgment, and pleads the same in bar of all the relief which the complainant now seeks by his bill.

And this defendant avers that he knows nothing whatever of the transactions between the complainant and the said B., and out of which the pretended equities of the complainant are supposed to arise, and can neither admit nor deny the charges in the bill in that behalf. He insists that all inquiry into these matters is precluded by the judgment aforesaid; but if it shall be considered by this court that they are still open for examination in this suit, he is advised to insist that the said B. is a necessary party to this suit to aid this defendant in his defense thereof.

And this defendant avers that he acquired the aforesaid promissory notes, before they or any of them became payable, *bona fide*, for a full and valuable consideration, and without notice of any of the equities or defenses now pretended by the complainant against them; he is therefore advised, and insists that his right as the holder thereof cannot be affected by proof now adduced of any latent equities existing between the original parties to the said notes.

And as to the matters of account which are pretended in said bill to be remaining unsettled between the complainant and this defendant, in respect of which a large balance of money is pretended to be due from this defendant to the complainant, this defendant says that upon the complainant's own showing, they are matters for the cognizance of a court of common law, and he therefore insists that this court has no jurisdiction to examine into them, or to grant any relief to the complainant in respect thereof; and he more especially relies on and pleads the judgment aforesaid against the claim of the said complainant to have the balance to be found due on the taking an account of

the aforesaid matters set off or discounted from the sum recovered by said judgment.

And this defendant further says that if the complainant ever had any cause of suit or action against this defendant for or in respect of the aforesaid matters of account, or any of them, the same did accrue unto him upwards of three years before the filing of the present bill, or suing out process thereon against this defendant, and upwards of three years before this defendant became the holder of the aforesaid promissory notes; and he pleads the act for limitation of actions and so forth against all the relief which the complainant seeks in respect thereof.

And this defendant, insisting on his aforesaid defenses, and praying to have the same benefit thereof as if they were herein specially pleaded, for further answer admits, &c., &c. [*Answer the several allegations in the bill; and as the bill usually charges fraud and combination, the answer should conclude as follows:*]

And this defendant denies all and all manner of fraud and conspiracy with which he is charged by said bill, and prays that the injunction heretofore granted in the cause may be dissolved, and that he may be hence dismissed, with his reasonable costs in this cause sustained. And as in duty bound he will ever pray, &c.

### Disclaimer.

*The disclaimer of A. to the bill of complaint of B. against him in this court exhibited..*

This defendant says that he does not know or believe that he ever had, nor did claim or pretend to have, nor doth he now claim or pretend to have any right, title, or interest of, in, or to the estates and premises in the said bill set forth, or any part thereof; and this defendant doth disclaim all right, title, and interest to or in the said estates and premises, and every part thereof. And prays to be dismissed, with costs, &c.

NOTE.—*This disclaimer must be under oath as an answer.*

### Form of General Replication.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto saith, that he will aver and prove his said bill to be true, certain, and sufficient in



law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things this repliant\* is and will be ready to aver and prove, as this honorable court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

NOTE.—*It is not usual to file a general replication, but to give a short order in writing to the register to enter a general replication. In Maryland it is thus: "A. vs. B. Mr. ———, enter a general replication to the defendant's answer." By rule in Massachusetts, the plaintiff enters, "That he joins issue on the answer."*

### III. FORMS OF INTERLOCUTORY AND FINAL PROCEEDINGS.

#### Form of Exceptions to the Defendant's Answer.

A.	}	<i>In Equity.</i>
vs.		
B.		

*To the Honorable*

The plaintiff prays leave to except to the answer filed by the defendant in this cause :

1. For that, &c. [*stating the cause of exceptions as briefly as possible.*]

2. For that the said answer is in other particulars insufficient.

#### *Order for hearing exceptions.*

In equity, the       day of       . Ordered that the within exceptions stand for hearing on the       next, provided a copy thereof and of this order be served on the defendant or his solicitor, before the       next.

#### *Order overruling exceptions.*

In equity, the       day of       . The within exceptions to the defendant's answer, standing ready for hearing, and being submitted upon the arguments of counsel for the parties, it is thereupon ordered, that the said exceptions be, and the same are hereby overruled, with costs to the defendant.

#### *Order sustaining exceptions.*

It is thereupon ordered, that the said exceptions be and the same are hereby sustained, and the defendant is hereby required

to make a better answer to the complainant's bill on or before the . And it is further ordered, that the defendant pay to the complainant his costs of the said exceptions, including a solicitor's fee, to be taxed by the register.

### Decree for an Account.

A.

vs.

B.

*In Chancery. September Term, 18 .*

This cause standing ready for hearing, and being submitted, the counsel for the parties were heard, and the proceedings read and considered.

It is thereupon, this       day of       , in the year       , by T. B., Chancellor, and by the authority of this court, adjudged, ordered and decreed,\* that the parties account with each other, of and concerning the matters in the proceedings mentioned; and that this cause be referred to the auditor [*or a master*], with directions to take such account from the pleadings and proofs now in this cause, and such other proofs [*if any*] as the parties may produce before him, on giving the usual notice.

NOTE.—*By the practice in some States, upon a suggestion by either party that it will be inconvenient to produce his witnesses before the auditor [or master], the following addition will be made to the decree :*

And the parties are hereby authorized to take depositions in relation to said account before any justice of the peace, on giving       days' notice, as usual: provided such depositions be taken and filed in the chancery office on or before the next.

NOTE.—*The auditor makes his report as of course, and the parties have the right, without any special reservation, to object that the auditor [or master] has improperly taken the account. It may, however, in decrees passed by consent of parties, be important that a reservation of their equities be made when they do not, by assenting to the decree, mean to admit the questions of right. Upon further directions, to be given on a hearing of the auditor's report, no order can be made inconsistent with or contradictory to the original decree. But the decree assumes the liability of the defendant to account to the complainant. Hence the question cannot be agitated on exceptions to the report unless the right to do so is reserved by the decree itself. The reservation may be in the following form :*

And all the equities of the parties against this decree are reserved to them respectively.

**Decree for an Account on a Creditor's Bill against an Executrix.**

*[For commencement, see preceding form to \*, p. 613.]*

That the said D., executrix, as aforesaid, do account with the complainants and other creditors of her testator, A. B., who may come in as parties to this suit, of and concerning the personal estate of her said testator, which has come to her hands as executrix or otherwise, and of her administration thereof; and that the auditor of this court [*or master*] take said account from the pleadings and proofs now in the cause, and such other proofs [*if any*] as the parties may produce before him. And the said parties are hereby allowed to take testimony in relation to said account before any justice of the peace on giving                      days, notice as usual; provided that such testimony be taken and filed in the chancery office on or before the                      next.

And the said defendant [*or complainant if he pleases*] is hereby directed by advertisement to be inserted in some paper published in                      , once in each of three successive weeks before the                      day of                      , to give notice to the creditors of the said testator to file their claims, with the vouchers thereof, in the chancery office, on or before the                      day of                      next.

**Decree for an Account with Special Directions.**

*[For the commencement, see the form to \*, p. 613.]*

That this cause be, and the same is hereby referred to the auditor [*or master*] with directions to take an account of what is due to the complainant from the defendant for principal and interest on the mortgage in the proceedings mentioned; and also of the rents and profits of the mortgaged premises received by the said complainant, or by any other person or persons by his order or for his use, or which he without his willful default might have received; and also of all sums of money laid out or expended by the said complainant in necessary repairs on the premises, or in payment of taxes assessed thereon; and that what shall be found to have been so expended be deducted from what shall be owing on the accounts of rents and profits. And if it shall be found that the annual rents and profits exceed the interest due on the said mortgage and the moneys expended as aforesaid, then that the said account be taken with annual rests, and that what shall be owing on account of rents and profits as aforesaid be applied, first to the payment of the interest accrued on the mortgage, and then in sinking the principal; and that said account be taken from the pleadings and proofs now in the cause, and such other proofs [*if any*] as the parties may produce before him on giving the usual notice, &c., &c.

**Order on Auditor's Report on a Creditor's Bill,**

WHERE SOME CLAIMS HAVE BEEN OBJECTED TO, RATIFYING REPORT  
AND REMANDING THE CAUSE FOR A FINAL ACCOUNT.

*In Chancery. January 4, 1824.*

Ordered, that the within [*or foregoing*] report of the auditor be and the same is hereby ratified and confirmed, and that this cause be, and the same is referred to the auditor with directions to state a final account, excluding all claims heretofore objected to, and the objections to which have not been removed.

**Order for a Reference with Special Directions.**

*In Chancery.*

This cause standing ready for further directions on the objections to the claims of the creditors, and on the exceptions to the auditor's report, and being submitted, the counsel for the parties were heard and the proceedings read and considered.

Whereupon it is ordered that this case be, and the same is hereby referred to the auditor. The claims of the plaintiffs, designated as Nos. 1, 2, 3, 4, and 5, must be allowed, together with claims Nos. 6, 7, 8, 9, 11, 13, 15, 16, 19, 20, 23, 24, 25, 29, 30, 31, 32, and 33; but the claims designated as Nos. 23 and 24 must be considered as barred in favor of those whose claims are not hereby rejected, and who have directed a plea of the statute of limitations against them. The claims marked Nos. 10, 12, 14, 17, 18, 21, and 22, must be wholly rejected, because they have none of them been sustained by legal and sufficient proofs; and the claims Nos. 26 and 27 must be wholly rejected, because it has not been shown that those who are primarily liable are insolvent. In conformity with these directions the auditor will state a final account, making a distribution of the personalty first; and then of the proceeds of the realty in due proportion, or in full if there be a sufficiency to satisfy all.

**Final Order of Ratification.**

*In Chancery. March , 18 .*

Ordered, that the foregoing report of the auditor be, and the same is hereby ratified and confirmed, and the trustee is directed to apply the proceeds accordingly, with a due proportion of interest on the commission and claims, as it has been or may be received.

**Final Order on Accounts distributing the Real and Personal Assets.**

*In Chancery. September , 18 .*

Ordered, that the foregoing report of the auditor be and the same is hereby ratified and confirmed, and the administrator and trustee are hereby directed to apply the assets and proceeds of sales accordingly to the payment of commissions, costs, and claims as the same are distributed by his accounts F and I, with a due proportion of interest that has been or may be received.

NOTE.—*Instead of the foregoing simple order of ratification, it is in strictness more correct practice to confirm the auditor's report by a decree awarding the payment of the money, as is shown in the next precedents.*

**Decree for Payment of Money where the Cause is Submitted without a Reference to the Auditor.**

*[The commencement is as in the form to \*, p. 613.]*

That the said defendant pay, or bring into this court to be paid unto the complainant the sum of \$ , current money, with interest thereon, from the day of , until paid or brought in as aforesaid, together with the complainant's costs of this suit, to be taxed by the register.

**Decree for Payment of a Sum ascertained to be Due by the Auditor's Report.**

This cause standing ready for further directions on the auditor's report and the exceptions thereto, and being submitted, the proceedings were read and considered.

It is thereupon, this day of , by T. B., Chancellor, and by the authority of this court, ordered and decreed:

That the auditor's report and accounts, filed on the day of , be and the same are hereby ratified and confirmed, and that the exceptions thereto filed by the defendants be, and the same are hereby overruled.

And it is hereby adjudged, ordered, and decreed, that the defendant pay, &c., &c., as in the previous precedent.

**Decree taking Bill Pro Confesso against a Non-resident or Defaulting Defendant.**

<p>C.  vs.  D.</p>	}	<p><i>In Chancery,</i>      <i>Term, 18 .</i></p>
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The order of publication heretofore passed in this cause, having been duly published [*or the order pro confesso, heretofore passed in the cause, having been duly served on the defendant; or the attachment with proclamations, heretofore issued in this cause, having been duly returned non est, and proclaimed*], and the said defendant having failed to appear and answer [*or to answer*] the bill of complaint,

It is, thereupon, this            day of            , by T. B., Chancellor, and by the authority of this court, adjudged, ordered, and decreed, that the said bill of complaint be, and the same is hereby taken *pro confesso* against the said defendant.

NOTE.—*The court is authorized, on taking the bill pro confesso, to proceed to decree relief, or to issue a commission to take testimony. If the case is such as will justify a final decree, this addition is made to the preceding form:*

And it is further adjudged, ordered, and decreed, that the property in the proceedings mentioned be sold, &c., &c.

*Where further testimony is required to make out the complainant's case, the decree proceeds thus:*

And a commission, or commissions, is hereby directed to be issued to such person or persons as the complainant shall nominate, to take testimony for the purpose of informing this court what relief the said complainant is entitled to.

*Where the decree is passed against one of several defendants, and the cause is not brought on to a hearing against the other defendants, the following addition is usually made to the decree:*

And the said complainant is hereby authorized to take testimony under any commission which may be issued in this cause, to be used at the hearing thereof against the said defendant.

*Where the bill is brought on to a hearing against some of the defendants, and at the same time it is desired to take the*

*bill pro confesso against a defendant who has stood out the process of the court as a non-resident defendant, the decree is in common form thus :*

C.	} <i>In Chancery, &amp;c.</i>
vs.	
D.	

This cause standing ready for hearing, and being submitted, the proceedings were read and considered.

It is, thereupon, this                      day of                      , by T. B., Chancellor, and by the authority of this court, adjudged, ordered, and decreed, that the bill of complaint be, and the same is hereby taken *pro confesso* as against the non-resident defendant D.

And it is further adjudged, ordered, and decreed, &c., &c., &c. [*giving relief in common form*].

NOTE.—As these decrees are statutory confessions of all the averments in the bill, the statutes of the States where they are authorized must be examined for their peculiar provisions. But the above form and directions will serve as a common guide.

#### **Order of Reference in Foreclosure Suit.—All Due.— Infant Defendants.**

[*Title of cause.*]

At a Court of Chancery, held for the State  
of New York at                      , on the  
day of                      , 1843.

Present, REUBEN H. WALWORTH, *Chancellor.*

The bill in this cause having been taken as confessed by the adult defendant, and the infant defendants having put in a general answer by their guardian *ad litem*; on motion of I. E., complainant's solicitor, it is ordered, that it be referred to a master in this court, residing in the county of Saratoga, to take proof of the material facts stated in said bill, and report the same to this court; and also to compute and ascertain the amount due to the complainant for principal and interest on the bond and mortgage set forth in said bill, and report the same to this court.



MASTER'S REPORT OF AMOUNT DUE ON BOND AND MORTGAGE, ON  
BILL TAKEN AS CONFESSED ALL DUE.

[*Title of cause.*]

*To the Chancellor of the State of New York.*

In pursuance and in virtue of an order of this court, made in the above case, and bearing date the            day of           , in the year one thousand eight hundred and forty-           , by which it was referred to one of the masters of this court, to compute, ascertain and report the amount due to the complainant for principal and interest on the bond and mortgage mentioned and set forth in his bill of complaint, filed in this cause, and report thereon to this court, with all convenient speed: I, the subscriber, one of the masters of this court, residing in the county of Saratoga, do respectfully certify and report, that I have computed and ascertained the amount due to the complainant in this cause as aforesaid, and that the amount so due on the said bond and mortgage, for the principal and interest up to and including the date of this report, is the sum of            dollars.

And I do further certify and report, that the schedule herunto annexed, marked A, and making a part of this my report, contains a statement and account of the principal and interest moneys due to the complainant aforesaid, the period of the computation of the interest and its rate, and to which, for greater certainty I refer.

All of which is respectfully submitted.

P. G. E.,  
*Master in Chancery.*

Dated, January 10th, 1844.

SCHEDULE MARKED A, REFERRED TO IN THE FOREGOING REPORT.

One bond, dated June 10th, 1841, in the penal sum of \$1,000, conditioned to pay \$500 as follows, viz.: on the first day of January, 1842, with interest, which bond is accompanied by a mortgage of the same date.

Principal sum due.....	\$500 00
Interest thereon from June 10th, 1841, to January 10th, 1844, being 2 years and 7 months, at seven per centum, per an- num, is.....	89 00

Amount due complainant this 10th day of January, 1844.....	\$589 00
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P. G. E.,  
*Master in Chancery.*

**Notice of Motion.**[*Title of cause.*]*Sir :*

Take notice that I intend to move this honorable court, at the next [*special*] term thereof, to be held at the Capitol in the city of Albany, on the            day of            next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order that [*specify the object of the motion*]; and for such further or for such other order or relief as the court may think proper to grant; which motion will be founded on affidavits, with copies of which you are herewith served [*and on the bill and answer filed in this cause*].

Yours, &amp;c.,

W. H.,

*Solicitor for Defendant.*

Dated, December            , 1843.

To I. E., Esq.,

*Solicitor for Complainant.***Affidavit of Service of Notice of Motion.**

*State of New York,* } ss. :  
*Saratoga County.* }

W. H., of the city of Troy, in said county, the defendant's solicitor, being duly sworn, deposeth and saith, that on the day of            instant, this deponent served upon I. E., Esq., the solicitor for the complainant in this cause, copies of the affidavits and notice of motion hereto annexed, by delivering the same to him personally. And further saith not.

W. H.

Sworn, etc.

**Petition for Leave to File Supplemental Bill.***In Chancery. Before the Chancellor.*[*Title of the cause.*]*To the Chancellor of the State of New York :*

The petition of A. B., the above complainant, respectfully sheweth, that on or about the            day of            , your petitioner filed his bill in this honorable court against C. D., for the

purpose of [*state general object of the original bill*] and praying [*state the prayer verbatim.*]

And your petitioner further shows that the said C. D., being served with process of subpoena, appeared to the said bill, but has not yet put in his answer thereto. That after the appearance of said defendant was entered, that is to say, on or about the       day of       , and before any further proceedings were had in the said cause [*state the supplemental matter*]; wherefore, your petitioner is advised, that it is necessary to bring the said C. H. W. before this court, as a party defendant to this suit.

Your petitioner therefore prays that leave may be granted to him to file a supplemental bill against the said C. H. W. for the purpose of making him a party defendant to this suit, with proper and apt words to charge him as such, and with such prayer for relief as may be proper, and for such other, &c.

### **Plea to Supplemental Bill.**

*In Chancery. Before the Chancellor.*

*The plea of C. D., defendant, to the supplemental bill of A. B., complainant.*

This defendant, by protestation not confessing or acknowledging all, or any, of the matters and things in the said complainant's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged for plea to the whole of the said bill, says that the several matters and things in the said complainant's present bill stated and set forth by way of supplement, arose, and were well known to the said complainant, before and at the time the said complainant filed his original bill in this cause; and that such said several matters and things can now be introduced, and ought so to be, if necessary, by amending the said original bill. Wherefore this defendant doth plead the aforesaid matters and things to the said complainant's bill, and prays the judgment of this honorable court, whether he should be compelled to make any further answer to the said bill, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C. M. D., *Sol'r for Defendant.*  
J. E., *of Counsel.*

**Petition that Trustees, under a Declaration of Trust, report their Proceedings, and Trustees under a Will come to an Account.**

SAMUEL S. MEYERS, &C.

vs.

WILLIAM R. MEYERS & OTHERS.

*In Chancery.*

*To the Honorable John Johnson, Chancellor of Maryland:*

The petition of Ezra Houck, of Frederick county, respectfully shows: That an order was passed by your honor, on the 28th day of March, 1851, in this cause, directing Samuel S. Meyers and James Williams, trustees under a declaration of trust filed in this cause, to invest the amount then received and to be received, of a certain bond of fifteen thousand dollars, in the joint names of Franklin Meyers and Charles J. Myers, infant children of Charles H. Meyers, deceased. That since the date of that order, to wit, on or about the 7th day of July, 1851, Charles J. Meyers, one of said infant children, has departed this life, and that on the 12th day of January, 1852, letters of administration were granted by the orphans' court of Frederick county, to your petitioner, upon the estate of said infant child deceased, as will appear by the certificate of the register of wills of Frederick county, herewith filed. That also, since the date of that order, to wit, on the 12th day of May, 1851, your petitioner was appointed by the orphans' court of Frederick county, guardian to both Franklin Meyers and Charles J. Meyers; as will appear by the certificates of the register of wills of Frederick county herewith filed.

Your petitioner further shows, that the said Samuel S. Meyers and James Williams, trustees, have made no report to your honor of their proceedings under and by virtue of your order of the 28th day of March, 1851, but have neglected so to do up to this time, whereby your petitioner is unable to know the condition of the estate of the said infant children, and is prevented from taking it under his control as guardian and administrator.

Your petitioner further shows that Samuel S. Meyers, James Williams and Joshua S. Inloes, the executors and trustees under the last will and testament and the several codicils of the late Jacob Meyers, deceased, have not settled an account in your

honorable court, since May, 1850; whereby your petitioner is unable to know what is the condition of the estate of the said Jacob Meyers, and what is the amount still due from said estate to the infant children of the late Charles H. Meyers, deceased, and cannot on that account discharge his duties and exercise his rights as guardian and administrator aforesaid.

Your petitioner further charges that there are large arrearages of interest due to the said infant children from the estate of Jacob Meyers, but the exact amount of which your petitioner cannot ascertain until the trustees settle their account in your honorable court.

Your petitioner therefore prays your honor to order that the said Samuel S. Meyers and James Williams, trustees under the said declaration of trust, report to your honor by a certain day, their proceedings under and by virtue of the order in chancery of the 28th day of March, 1851; and also that Samuel S. Meyers, James Williams and Joshua S. Inloes, the trustees under the will of Jacob Meyers, deceased, come to an account in your honorable court of the estate of the said Jacob Meyers, deceased; and your petitioner prays for such other and further relief in the premises as to your honor shall seem meet.

And your petitioner will ever pray.

S. T.,

*Sol'r for Petitioner.*

#### **Attachment against Trustees for not Reporting.**

*The State of Maryland,*

*To the Sheriff of Frederick County, greeting:*

You are hereby commanded, that you attach the bodies of Samuel Meyers and James Williams, if they shall be found in your bailiwick, and them safely keep, so that you have them before the Chancellor of Maryland, at the city of Annapolis, on the       day of       next, to answer, as well touching a certain contempt by them committed in not filing their report of their proceedings under a declaration of trust, as they were required to do by an order passed in this our Court of Chancery, on the 28th day of March, 1851, and as to such other matters and things as shall be then and there alleged against them.

Hereof fail not, as you will answer to the contrary at your peril.

Witness the honorable John Johnson, Chancellor of Maryland, the       day of       , in the year of our Lord eighteen hundred and fifty-two.

Issued the       day of       , 1852.

— — —, *Register.*

**Decree for Partition between Joint Tenants or Tenants  
in Common.**

*[For the commencement, see form on p. 613, to the \*.]*

That there be a partition of the tract or parcel of land in the proceedings mentioned, called B. A., amongst the parties to this suit, so that nine parts thereof, in twelve parts to be divided, shall be allotted to the complainant A., and two other parts thereof, in twelve parts to be divided, shall be allotted to the complainant B., and the remaining one-twelfth part thereof shall be allotted to the defendant G.

And to enable this court to make the said partition, it is further adjudged, ordered and decreed, that a commission issue in the usual form to [5 *persons*] of            county, authorizing them or any four or three of them, to enter upon, walk over, and survey the said land, and to divide the same into twelve equal parts, having regard to quantity and quality, whereof nine contiguous parts shall be allotted to the said complainant A., and two contiguous parts shall be allotted to the said complainant B., and one part shall be allotted to the said defendant C.; that the said commissioners make out, or cause to be made out, a plot and certificate of said land, and of the division thereof, with the beginning and courses, and an accurate description of the estate, and of the parts thereof; and to the said commission there shall be annexed the usual oath of office.

**Commission for Partition.**

*Maryland, S. C.*

*The State of Maryland, to A., B., C., D. and E., of  
county, greeting :*

Know ye, that we have, pursuant to an order of our High Court of Chancery, this day passed in a cause therein, between A. and B., complainants, and C., defendant, fully authorized and empowered you, or any four or three of you, to go to, enter upon, walk over and survey the tract or parcel of land in the proceedings in the cause mentioned, called Black Acre, lying and being in            county, and to divide the same into twelve equal parts, having regard to quantity and quality, and to allot nine parts thereof to the complainant A., and two parts thereof to the complainant B., and the remaining part to the defendant C.; and that you make out, or cause to be made out, a plot of said land, with a certificate of the beginning and courses, and an

accurate description thereof, and of each part, according to the division by you made; and that you call upon the parties to produce all such deeds, writings and muniments relating to the said estate as may be in their power; and that you examine and take the depositions of witnesses relating to the matters in question, as you may think fit; and when you shall have done so, you, or any four or three of you who shall act, are to certify and return into our Court of Chancery, without delay, your acts and proceedings in the premises, together with the plots, descriptions and documentary or other evidence made, produced to, or taken by you, by your certificate, distinctly and plainly written, closed up, and under your several seals, or the seals of such four or three of you as shall act: provided, nevertheless, that, before you or any of you shall act in the premises, you, or such of you as are to act, shall each take the oath hereunto annexed; and we do give full power and authority to any two or one of you, jointly or severally, to administer such oath on the holy Evangels.

Witness, the Honorable T. B., Chancellor, this                      day  
of

#### **Commissioner's Oath.**

You shall, according to the best of your skill and judgment, make the partition as directed by the foregoing commission, and in all things truly and faithfully execute the powers given, and perform the duties required of you by the said commission, without favor or partiality to, or prejudice or ill will against any person whatsoever interested therein.

#### **Return of Commissioners to make Partition.**

*To the Honorable T. B., Chancellor of Maryland.*

The subscribers, commissioners appointed by a commission issued out of the Court of Chancery, in a cause wherein A. and others are complainants, and C. and others are defendants, and which commission is hereunto annexed, do hereby certify that after having taken the oath annexed unto the said commission for us to be taken, and given notice to the parties of the time and place of our meeting, we did, in pursuance of said notice, meet on the said land mentioned in the commission, on the day of                      , and did walk and ride over the said land, and

caused the same to be surveyed and divided into three parts, as directed by said commission, by \_\_\_\_\_, a deputy surveyor of \_\_\_\_\_ county, who was appointed by us for the purpose, in the manner following, to wit :

Beginning, for the outlines of the whole tract, at and running, &c., &c., &c.

And beginning, for lot No. 1, being parcel of said tract, at the beginning of the whole tract, and running thence, &c., &c., &c. ; which said lot is, in our opinion, in quantity and quality, equal to two twelfth parts of the whole tract of land, and is by us allotted to the complainant, B.

And beginning, for lot No. 2, being parcel of said tract, at, &c., &c. ; which said lot, in our opinion, is equal in quantity and quality to nine parts in twelve of the whole tract ; and we have allotted the same to the complainant, A.

And beginning, for lot No. 3, being, &c., &c., &c.

All which proceedings, with a plot of said land, and of the divisions thereof, and the aforesaid commission, we return close under our hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_

[L. S.]  
[L. S.]  
[L. S.]  
[L. S.]  
[L. S.]

NOTE.—*All these papers are attached to the commission, which is then closed and thus indorsed :*

The execution of this commission will appear by certain schedules thereunto annexed.

[L. S.]  
[L. S.]  
[L. S.]  
[L. S.]  
[L. S.]

NOTE.—*As the commission is the only warrant to the commissioners, it must contain all special directions contained in the decree.*



**Common Form of a Final Decree for Partition.**

A. &amp; B.

vs.

C. &amp; D.

*In Chancery.* ——— *Term, 18—.*

This cause standing ready for hearing, and being submitted, and no exception being taken to the return of the commissioners appointed to make partition of the real estate mentioned in the proceedings, as allowed by the rules of this court, the proceedings were read and considered.

It is thereupon, this            day of           , by T. B., Chancellor, and by the authority of this court, adjudged, ordered, and decreed, that the return of the commissioners appointed to make partition of the real estate in the proceedings mentioned, and the partition thereof by them made, be, and the same is hereby ratified and confirmed.

And it is further adjudged, ordered, and decreed, that the complainant, B., shall hold in severalty, and not jointly or in common with the other parties to this suit, all that part of the land in the proceedings mentioned, which is described in the return of the aforesaid commissioners, and the plot accompanying the same, as lot No. 1, and beginning for the same (it being part of the tract or parcel of land called B. A.) at the beginning of the whole tract, and running thence, &c., &c.

And it is adjudged, ordered, and decreed, that the complainant, A., shall hold in severalty, &c., &c.

And it is further adjudged, ordered, and decreed, that the costs of the aforesaid partition, and other costs of this suit, be defrayed by the aforesaid parties, in proportion to their respective interests, as established by the interlocutory decree heretofore passed in this cause.

**Decree declaring a Lien or Charge upon an Estate**

FOR THE INCREASED VALUE BY IMPROVEMENTS MADE BY A BONA FIDE PURCHASER, FOR A VALUABLE CONSIDERATION, WITHOUT NOTICE OF ANY DEFECTS IN THE TITLE.

*First interlocutory decree in the case of John Bright in equity against John W. Boyd.*

And now, at this term, the cause came on to be heard upon bill, answer, pleadings, evidence, and other proceedings in the

cause, and was argued by counsel. On consideration whereof, it is ordered, adjudged, and declared by the court, that is to say, that it appears to the court that the plaintiff is the purchaser, for a valuable consideration, of a defective title, without notice of the defect therein, and that improvements have been made by the plaintiff, or his grantors, on the premises of the defendant, under a mistake of the title, and that he is entitled to relief in equity.

That it be referred to a master, if the parties do not otherwise agree, to ascertain the character and value of said improvements, by whom made, and at what time they were made. Also, that the master ascertain and report of the value of the rents and profits of the land on which said improvements are made, and state an account thereof. Also, to ascertain and report the present value of the said land without the improvements, and how far the value of said land is increased by said improvements.

And that the master is to ascertain the foregoing facts, as well by the examination of witnesses as by the examination of the parties, and by other suitable proofs, and to make report thereof to the court. And that the master be clothed with all proper powers for the purposes aforesaid; and that further orders and decrees in the premises be reserved until the coming in of the report.

### *Report of the master.*

The master to whom it was referred to ascertain the character and value of the improvements on the lot in controversy, by whom made, and at what time they were made, and to ascertain and report upon the value of the rents and profits of the land on which said improvements are made, and state an account thereof; also, to ascertain and report the present value of the land without the improvements; reports that, as far as he has been able to ascertain, the improvements upon said lots were made by John E. Marshall; they consist of a double wooden tenement of two stories, which was built in the years 1834 and 1835, and completed in the early part of the summer of 1838; that the said improvements are worth nine hundred and seventy-five dollars; and that the land without the improvements would be worth at this time twenty-five dollars; and that the land, with the improvements, is now worth one thousand dollars, so that the value of the land is increased by the improvements nine hundred and seventy-five dollars; and that, in his opinion, there would have been no rents and profits from said land if no improvements had been made thereon.

H. W.

Fees, \$——.

*Final decree.*

And now, on coming in of the master's report, it is ordered, that the same be accepted and allowed.

And it is further ordered, adjudged, and declared, that the said improvements, to the value of nine hundred and seventy-five dollars, are a lien upon the whole of the premises described in the plaintiff's bill, and that one-quarter part of the said premises stand charged with one-quarter of the said improvements.

And it is further ordered, that unless one-quarter part of the said sum of nine hundred and seventy-five dollars is paid by the defendant to the plaintiff by the next term of said court, one-quarter part of the whole of the said premises, with the improvements thereon, shall be sold, and the proceeds thereof, to an amount not exceeding one-quarter of nine hundred and seventy-five dollars, shall be paid over to the plaintiff.

And it is further ordered, that all further orders and decrees in the premises be reserved until the further order of court. (Bright v. Boyd, 2 Story, 607.)

**Decree for a Sale of Mortgaged Premises.**

C.

vs.

D.

} *In Chancery. September Term, 18*

This cause standing ready for hearing, and being submitted without argument, the proceedings were read and considered.

It is, thereupon, this       day of       , in the year of our Lord eighteen hundred and       , by T. B., Chancellor, and by the authority of this court, adjudged, ordered and decreed [*that, unless the defendant shall on or before the       next, pay, or bring into this court to be paid, unto the complainant the sum of \$       , with interest thereon from the       , until paid or brought in as aforesaid, together with the complainant's costs of this suit to be taxed by the register, the mortgaged premises in the proceedings mentioned, or so much thereof as may be necessary for the purpose, be sold*].

That I. P., of       county, be, and he is hereby, appointed trustee to make such sale; and the course and manner of his

proceeding shall be as follows: He shall first file in the chancery office a bond to the State of Maryland, executed by himself, with a surety or sureties to be approved by the chancellor, in the penalty of *ten thousand* dollars, conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future order or decree in the premises. He shall then proceed to make sale of the said mortgaged premises, having first given at least \_\_\_\_\_ weeks previous notice in some newspaper printed in \_\_\_\_\_ aforesaid, and such other notice as he may think proper, of the time, place, manner, and terms of sale, which terms shall be as follows: The purchase money to be paid in equal installments, in one, two and three years from the day of sale—the whole purchase money to bear interest from the day of sale, and the payment thereof to be secured by the bonds of the purchaser, with a surety or sureties to be approved by the trustee [*or cash to be paid on the day of sale, or on the ratification thereof by the chancellor*].

And, as soon as may be convenient after such sale or sales, the said trustee shall return to this court a full and particular account of the same, with an affidavit of the truth thereof, and of the fairness of such sale or sales, annexed. And on the ratification of such sale or sales by the chancellor, and on the payment of the whole purchase money, and not before, the said trustee, by a good and sufficient deed, to be executed and acknowledged agreeably to law, shall convey to the purchaser or purchasers of said property, and to his, her, or their heirs, the property to him, her, or them sold, free, clear, and discharged of all claim of the parties to this cause, and of any person or persons claiming by, from or under them. And the said trustee shall bring into this court the money arising on such sale or sales, and the bonds or notes which may be taken for the same, to be disposed of under the direction of this court, after deducting therefrom the costs of this suit, and such commission to the trustee as the chancellor shall think proper to allow in consideration of the skill, attention and fidelity wherewith he shall appear to have discharged his trust.

NOTE.—*The foregoing general form of a decree for a sale may be converted into decrees for sales, for the purposes which follow.*

### **Decree for a Sale for the purpose of Partition.**

*By striking out the words in italics and included within brackets, and inserting :*

That the real estate in the proceedings mentioned be sold for the purpose of partition between the parties.

**Decree for a Sale on a Creditor's Bill.**

*By striking out the same words in italics, and inserting :*

That the real estate of A. B., deceased, in the proceedings mentioned, or so much thereof as may be necessary for the payment of his debts, be sold.

*At the end of this decree, there ought to be added :*

And, at the time of advertising said sale, the trustee is directed to give notice to the creditors of the said A. B., deceased, to file their claims, with the vouchers thereof, in the chancery office within                    months from the day of sale.

NOTE.—*The executor or administrator is usually a party to a creditor's suit. And if the personal estate is unsettled, the decree ought to contain, at the end thereof, a clause directing the executor or administrator to account for the personal assets in his hands.*

**Decree Annulling a Conveyance as Fraudulent in favor of Creditors, and Directing a Sale.**

*[For commencement see the form on p. 613 to \*.]*

That the deed in the proceedings mentioned from the defendant A. to the defendant B., dated the                    day of                    , be, and the same is hereby, declared and taken to be utterly null and void as against the complainant, and all other creditors of the said defendant A. who may come in as parties to this suit ; and that the property in the said deed mentioned, or so much thereof as may be necessary to discharge such claims, be sold. That, &c. *[in the common form of a decree for a sale, and concluding with a direction that the trustee give notice to the creditors of A. to file their claims].*

**Decree Vacating a Conveyance as Fraudulent in favor of a Purchaser at a Sheriff's Sale.**

*[For commencement see the form on p. 613 to \*.]*

That the deed in the proceedings mentioned from the defendant A. to the defendants B. and C., bearing date on the                    day of                    , and the record thereof, be, and the same are hereby, set aside, and declared to be held and taken to be utterly null and void to all intents and purposes whatever, is

far as the same may interfere with, or in any manner affect, the right and claim of the complainant as purchaser of the several parcels of land specified in the said return to the writ of *feri facias* in the proceedings mentioned; and that the said defendants pay to the complainant his costs of suit to be taxed by the register.

**Decree for Payment of Purchase Money and a Conveyance, and in Default of Payment, then a Sale.**

*[For commencement see the form on p. 613 to \*.]*

That the defendant forthwith pay, or bring into this court to be paid unto the complainant the sum of \$ , the same being the balance of purchase money due for the lands, &c., in the proceedings mentioned, together with interest thereon from the day of , until so paid or brought in, and the complainant's costs of suit to be taxed by the register. And that, upon payment of the aforesaid sum of money, with interest and costs as aforesaid, or bringing the same into this court, the complainant, by a good and sufficient deed, to be executed and acknowledged agreeably to law (and wherein the said complainant shall procure his wife, A. B., to join for the purpose of barring her title to dower in said premises) shall convey unto the said defendant and his heirs the land and premises in the proceedings mentioned and described as sold by the said complainant to the said defendant, and all right, title, interest and estate of the complainant in and to the same. And the said deed shall contain a covenant, &c., &c.

And it is further adjudged, ordered, and decreed, that, unless the defendant shall pay, or bring into this court to be paid unto the complainant the aforesaid sum of money, with interest and costs as aforesaid, on or before the instant, the aforesaid lands and premises, or so much thereof as may be necessary to discharge the complainant's claim then remaining unsatisfied, be sold. That, &c., &c. [*according to the general form of a decree for a sale*].

**Trustee's Report of a Sale.**

C.

vs.

D.

*In Chancery.**To the Honorable, the Chancellor of Maryland.*

The report of A. B., trustee appointed by the decree in this cause to make sale of certain real estate therein mentioned, shows that, after giving bond with security for the faithful discharge of his trust, as required by said decree, and giving notice of the time, place, manner, and terms of sale by advertisements in the \_\_\_\_\_, a newspaper printed at Annapolis, for more than three successive weeks before the day of sale, and by handbills extensively circulated throughout said city and Anne Arundel county, he did, pursuant to said notice, attend, at the tavern of Swann and Iglehart, in said city, on Tuesday, the second day of October, in the year eighteen hundred and thirty-eight, at twelve o'clock, M., and then and there proceeded to sell said real estate as follows, to wit: Your trustee first offered at public sale to the highest bidder the dwelling-house of the said M., situated in the city of Annapolis, and sold the same to E., he being then and there the highest bidder therefor, at and for the sum of five thousand dollars; and he has since taken the bonds of the said E., with F. and G. as his sureties, for the payment of the said sum in equal moieties, with interest thereon, in one and two years. He next offered for sale the plantation or farm of the said M., deceased, in Anne Arundel county, containing one thousand acres or thereabouts, and received therefor a bid of eight dollars per acre; deeming this wholly inadequate to the value of the land, he adjourned the sale thereof. Your trustee further states, that since that time he caused the said plantation to be accurately surveyed by the surveyor of said county, and to be divided into lots, as appears by the plot accompanying this report; and after giving notice in the manner before stated, of the time, place, manner and terms of sale, he did, pursuant to such notice, attend on the premises on, &c., &c., and then and there sold parcels thereof as follows:

Lot No. 1, containing 275 acres, he sold to H. of said county, at and for the price of \$20 an acre, the whole purchase money amounting to \$5,500. And he has since taken bonds of the said H., &c., &c.

Lot No. 2, containing 300 acres, was struck off to one M., at \$15 an acre, he being then and there the highest bidder for the same. But the said M. has refused, and still refuses to give bonds to your trustee, to secure the payment of the purchase money agreeably to the terms of sale.

Lot No. 3, there was no bidder for. Since the date aforesaid, to wit, on the       day of       , your trustee has sold said lot containing 400 acres, at private sale, to one N., for \$12 an acre, on credits of one, two, three, four and five years from the day of sale; and he has taken the bonds of the said purchaser, with O. and P., his sureties, for the punctual payment of said installments, with interest from the day of sale.

And your trustee further reports, that at the time of advertising said sales, he gave notice to the creditors of the said C. D., deceased, to file their claims, with the vouchers thereof, in the chancery office, within four months from the day of sale.

Which is respectfully submitted.

*Anne Arundel county, to wit.*

On this       day of       , before the subscriber, a justice of the peace in and for said county, personally appeared the within named A. B., trustee, and made oath that the matters and things stated in the foregoing report are true to the best of his knowledge and belief, and that the sales therein reported were fairly made.

#### **Conditional Order of Ratification.**

*In Chancery. Sept.*

Ordered, that the sales made and reported by A. B., trustee for the sale of the real estate of C. D., deceased (other than the sale made to M., which is hereby absolutely rejected), be ratified and confirmed, unless cause to the contrary thereof be shown on or before the       day of November next, provided a copy of this order be inserted in some newspaper printed at       once in each of three successive weeks before the day of October next.

The report states the amount of sales to be \$15,300.



**Final Order of Ratification.**

[*Usually written with the conditional order on the report.*]

*In Chancery. Nov.*

Ordered, that the sales within reported be, and the same are hereby ratified and confirmed, no cause to the contrary thereof having been shown, although notice appears to have been given as directed by the preceding order. The trustee is allowed for commission and all expenses, the sum of

**Petition of Trustee against a Delinquent Purchaser.**


---

C.

*vs.*

D.

---

*In Chancery.*

*To the Honorable T. B., Chancellor of Maryland:*

The petition of A. B., Trustee, appointed by the decree in this cause to sell the real estate in the proceedings mentioned, humbly shows, that in execution of the authority vested in him by said decree, he did on the            day of           , sell unto a certain E. of            county, a parcel of said estate, consisting of           , and more particularly described in his report of said sale, at and for the sum of one thousand dollars, which was to be paid on the day of sale, or on the ratification thereof by this court; and that said sale has been duly reported to and ratified by this court, as by said report and the proceedings thereon, now remaining in this court, will appear.

And your petitioner further charges that the said E. has paid no part of the aforesaid purchase money, although he has notice of the ratification of said sale, so made to him as aforesaid, and has been required by your petitioner to pay the same.

Your petitioner, therefore, prays that the said E. may be compelled by a decree or order of this court, to pay the aforesaid purchase money with interest thereon, and in default thereof, that the aforesaid parcel of real estate may be decreed to be sold for the purpose of raising the same, or such other or further relief granted unto your petitioner, as his case may require. And as, &c.

**Conditional Order on the Petition.***In Chancery.*

On the foregoing petition it is ordered, that the said E. bring into this court the said sum of one thousand dollars, with interest thereon, from           , or show good cause to the contrary on or before the            next; provided, a copy of the foregoing petition be served on the said E. on or before the instant.

**Final Order on the Petition.***In Chancery.*

A copy of the within petition and order having been duly served on the said E., and he having failed to bring the sum of money therein mentioned into court, or to show cause to the contrary, it is thereupon ordered, that the said E. forthwith bring into this court the aforesaid sum of one thousand dollars, with interest thereon from the            until brought in, together with the costs of this proceeding.

**Final Order directing a Sale, with a Special Direction.***In Chancery.*

A copy of the order of the           , passed on the petition of the trustee, having been duly served on the said E. therein named, and the said E. having failed to bring into court the sum of money, with interest therein mentioned, or to show cause to the contrary, it is thereupon, on motion of the trustee, ordered that the real estate in the said petition mentioned be sold for the payment of the purchase money thereof, with interest as aforesaid, and the costs of this proceeding by the said trustee, in the manner directed by the original decree, for cash, to be paid on the day of sale; and that the said sale be at the risk of the said E. And if the highest bidder at sale shall fail then and there immediately to pay the purchase money, the trustee may reject such bid, and accept the next highest bid upon the same terms; and if the next highest bidder shall also then and there fail to pay the purchase money, the trustee may reject his bid also, and postpone the sale to some other day.

### **Bond by a Trustee appointed to sell Real or Personal Estate.**

Know all men by these presents, that we, A., B. and C., of \_\_\_\_\_ county, in the State of Maryland, are held and firmly bound unto the said State of Maryland, in the full and just sum of \_\_\_\_\_, current money, to be paid to the said State of Maryland, or its certain attorney; for which payment well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this \_\_\_\_\_ day of \_\_\_\_\_, in the year eighteen hundred and thirty.

Whereas, by a decree in the Chancery Court of Maryland, bearing date on the \_\_\_\_\_ day of \_\_\_\_\_, eighteen hundred and thirty, and passed in a cause in the said court, wherein D. and others were complainants, and E. and others were defendants, the above bound A. has been appointed trustee to make sale of certain real estate in the proceedings in said cause mentioned :

Now, the condition of the above obligation is such, that if the above bound A. do and shall well and faithfully perform the trust reposed in him by said decree, or that may be reposed in him by any future decree or order in the premises, then the above obligation to be void, otherwise to remain in full force and virtue in law.

Signed, sealed and delivered }  
in the presence of }

[L. s.]  
[L. s.]  
[L. s.]

*The bond of a receiver is in the same form, with the necessary verbal alterations.*

### **Condition of Injunction Bond.**

Whereas, the said A. is about to obtain from the Court of Chancery an injunction to stay proceedings at law, on a judgment rendered against him in \_\_\_\_\_ county court, in favor of the said \_\_\_\_\_, for the sum of \_\_\_\_\_

Now, the condition of this obligation is such, that if the said A. shall prosecute the said writ of injunction with effect, and satisfy and pay as well the debt, damages and charges that

shall occur in the Court of Chancery, or be occasioned by the delay of execution on the said judgment, unless the Court of Chancery shall decree to the contrary, and shall in all things obey such order and decree as the Court of Chancery shall make in the premises, then the above obligation to be void, else to be and remain in full force and virtue.

### **Trustee's Deed.**

This Indenture, made this            day of            , in the year eighteen hundred and            , between A. B. of            county, of the one part, and C. D. of            county, of the other part.

Whereas, by a decree of the Court of Chancery of Maryland, dated on the            day of            , in the year eighteen hundred and            , and passed in the cause in said court, between E. and others, complainants, and F. and others, defendants, the above-named A. B. was appointed a trustee, with authority to sell the real estate in the proceedings in said cause mentioned; and the said trustee, after complying with all the previous requisites of the decree, did, on or about the            day of            , in the year eighteen hundred and            , sell unto the said C. D. the following parcels of said real estate, and at the price following; that is to say, all that part of a tract or or parcel of land called Blackacre, and lying and being in            county, which is contained within the following metes and bounds, courses and distances, to wit, beginning for the same at, &c., &c.            at and for the sum of            dollars, current money.

And, whereas, the aforesaid sale has been duly reported to and ratified and confirmed by the said Court of Chancery, and the purchase money aforesaid having been fully paid and satisfied to the said trustee, he is authorized by the said decree to execute these presents. Now, this indenture witnesseth that said A. B., trustee as aforesaid, for and in consideration of the premises aforesaid, and of the sum of five hundred dollars, current money, to him in hand paid by the said C. D., at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted bargained and sold, aliened, enfeoffed, released and confirmed, and by these presents doth grant, bargain and sell, alien, enfeoff, release and confirm unto the said C. D., his heirs and assigns, all the aforesaid tract, or part of a tract or parcel of land, which is hereinbefore described as sold by the said trustee to the said

C. D., with the appurtenances, and all the right, title, interest and estate of the parties to the aforesaid decree, and every of them, both at law and in equity, in and to the same, and every part and parcel thereof. To have and to hold the aforesaid tract, part of a tract, or parcel of land and premises, with their appurtenances, unto the said C. D., his heirs and assigns, to his and their only proper use and behoof, and to and for no other use, intent, or purpose whatsoever. In witness whereof the said A. B. hath hereunto set his hand and seal, the day and year first hereinbefore written.

Signed, sealed and delivered }  
in presence of }

[SEAL.]

*State of Maryland,*                      *county, to wit :*

On this                      day of                      , in the year eighteen hundred and                      , before the subscriber, a justice of the peace in and for the county aforesaid, personally appeared the above-named A. B., and acknowledged the foregoing instrument to be his act and deed ; and I further certify that the said A. B. is personally known to me to be the identical person named and described as, and professing to be, the party grantor in the foregoing instrument of writing.

NOTE.—*A simpler form of deed may be used in States where conveyancing has been simplified. The above form, with the necessary verbal alterations, will serve for a master in chancery in conveying real estate sold by him*

### Notice of Sale by a Master.

[*Title of cause.*]

In pursuance of a decretal order of the Court of Chancery, made in the above cause, will be sold under the direction of the subscriber, at public auction, at the Franklin House, in the city of Utica, on Tuesday, the                      day of                      next, at ten o'clock, A. M., all those three lots of ground [*describe property*].

J. M. A.,  
*Master in Chancery.*

Dated, Dec.                      1843

**Conditions of Sale.**

The property described in the above notice of sale will be sold free from all incumbrances. The purchaser will be required to pay twenty per cent. of the purchase money to the master, at the time of the sale, and the residue thereof within ten days thereafter, upon the delivery of the master's deed to him. The purchaser is also to pay the sum of \$        to the auctioneer, as his fee for selling the said property, and interest on such part of the purchase money as is not paid at the time of sale, provided the same shall not be paid on the delivery or tender of the deed.

All taxes and assessments are to be paid out of the purchase money, provided bills thereof are furnished to the master within the time limited for the delivery of the deed.

J. M. A.,  
*Master in Chancery.*

I acknowledge that I have purchased the property described in the above notice of sale, on the terms and conditions above specified, for the sum of \$       , to which terms and conditions I agree to conform. And I have already paid the twenty per cent. of the purchase money required to be paid at the time of the sale.

J. W.

Dated, etc.

**Master's Report of Sale in a Partition Suit.**

[*Title of cause.*]

*To the Chancellor of the State of New York:*

In pursuance of a decretal order of this court, made in the above case, and dated the        day of        last, I, the subscriber, one of the masters of this court, residing in the county of       , to whom the execution of the said order was confided, do report:

That having caused notice of the time and place of sale of the premises mentioned in said decretal order, containing a brief description thereof, to be published once a week for six successive weeks immediately previous to such sale, in one of the public newspapers printed in the county of       , where such premises are situated, and having also caused a copy of

such notice to be put up at three of the most public places in the town of \_\_\_\_\_, where the said premises are situated, I did, on the \_\_\_\_\_ day of \_\_\_\_\_, at ten o'clock in the forenoon, that being the time specified in the said notice, attend at the American Hotel, in the village of \_\_\_\_\_, the place therein mentioned, and exposed the said premises for sale at public auction to the highest bidder, as directed by said decretal order.

I do further report, that the several lots or parcels of land so directed to be sold as aforesaid, were each and every one of them put up for sale separately, and were each and every one of them struck off to J. K., for the following sums: Lot No. 1, for the sum of \$ \_\_\_\_\_; lot No. 2, for the sum of \$ \_\_\_\_\_; lot No. 3, for the sum of \$ \_\_\_\_\_; and lot No. 4, for the sum of \$ \_\_\_\_\_; those sums being the highest bidden for the said lots respectively, and the said J. K. being the highest bidder therefor, which several sums amount in the aggregate to \$ \_\_\_\_\_.

That the terms and conditions of such sales were reduced to writing, and made known to the persons attending such sale, previous to putting up the said lots, and were as follows: the purchaser or purchasers of each lot or separate parcel, were to pay ten per cent. of the purchase money down on the day of sale, and the residue when the sale should be confirmed and the deed delivered. And that the said J. K. has signed the written conditions of sale above mentioned, together with an acknowledgment that he has purchased the premises upon these terms, and he has paid to me the amount required to be paid down.

All of which is respectfully submitted.

J. K. P.,  
Master in Chancery.

Dated, etc.

*NOTE.—The above report will answer for a trustee or any other agent appointed in equity to make a sale of real estate, and the course of proceeding on the report will be the same. But see a trustee's report, ante, on page 633.*

### **Order to Confirm Master's Report of Sale.**

[*Title of cause.*]

At, etc.

On reading and filing the report of J. M. A., one of the masters of this court, of the sale of the mortgaged premises in this cause, and on motion of Mr. E., solicitor for complainant, ordered that the same be confirmed unless cause to the contrary thereof be shown within eight days from the entry of this order.

**Exceptions to Master's General Report.**

[*Title of cause.*]

Exceptions taken by E. F., one of the above defendants, to the general report of J. M. A., the master to whom this cause stands referred, by the decree made herein, on the       day of       , 1843, and which report bears date the       day of       , 1843:

*First exception.*—For that the said master, etc.

*Second exception.*—For that the said master, etc.

Wherefore the said defendant doth except to the said general report, and appeals therefrom to the judgment of this court.

W. H.,  
*Sol'r for Deft. E. F.*  
S. A., *of Counsel.*

**Further Directions.**

NOTICE OF HEARING FOR FURTHER DIRECTIONS UPON MASTER'S  
GENERAL REPORT.

[*Title of cause.*]

*Sir :* Take notice that this cause will be brought to a hearing for further directions upon the general report of J. M. A., the master to whom the said cause was heretofore referred, at the next term of this court, to be held at the Capitol, in the city of Albany, on the       day of       next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated, etc.

Yours, etc.,

J. E., *Sol'r for compl't.*

To W. H., Esq., *deft's sol'r.*

**Decree against an Executor for a part of the Debt, and  
for the residue to be paid out of future Assets.**

[*For commencement, see form on p. 613 to \*.*]

That there is due to the complainants from the defendant, as executor of A. B., deceased, the sum of five thousand dollars, current money, with interest thereon from the       , until paid.



And it is further ordered and decreed that the said defendant forthwith pay or bring into this court, to be paid to the said complainant, the sum of six hundred and fifty dollars (being a just proportion of the assets of his testator, which have come to the hands of the said defendant, as executor, to be administered), with interest thereon, from the                    until paid or brought in as aforesaid, together with their costs of this suit, to be taxed by the register.

And it is further adjudged, ordered and decreed, that the said defendant pay to the said complainants the sum of                    dollars, with interest as aforesaid (being the residue of the aforesaid debt), out of any assets of his testator which may hereafter come into his hands to be administered, and which may be subject thereto in a due course of administration.

*NOTE.—A decree against an executor for the payment of money in his hands, does not act directly against the assets, but against the person of the executor. The report of the auditor, or other evidence, shows the sum in his hands applicable to the complainant's demand, and the decree directs the payment of that sum to the complainant. Failure to comply with the decree is a contempt, and process to punish that contempt may go against the person of the defendant.*

**Decree on Creditor's Bill against Executor, where the Assets in hand are Insufficient.**

*[For the commencement, see form, p. 613 to \*.]*

*[For the clause of decree ratifying the auditor's report, see form, p. 616.]*

And it is further adjudged, ordered and decreed, that there is due from the defendant, as executor of A. B., deceased, unto the complainant C., the sum of                   , with interest thereon from the                    until paid, and unto, &c., &c., &c.

And it is further adjudged, ordered and decreed, that the said defendant forthwith pay or bring into this court to be paid unto the said complainant C., the sum of                   , with interest thereon from                   , until paid or brought in as aforesaid, and unto the said                    the sum of                    &c., &c., &c. The sums, as aforesaid decreed to be paid, being their respective proportions of the assets of the said A. B., deceased, which have come to the hands of the said defendant, as executor, to be administered.

And it is further adjudged, ordered and decreed, that out of any assets of his said testator, which may hereafter come into

the hands of the said defendant, as executor, and which may be subject to the payment of the claims of the aforesaid creditors, in a due course of administration, the said defendant pay unto the said complainant the sum of                   , &c., &c., &c.

And it is further adjudged, ordered and decreed, that the said defendant pay the costs of this suit, as allowed by the aforesaid account of the auditor, to the persons who are by said account made entitled to receive the same.

### **Decree Dismissing the Bill.**

*[For commencement see p. 613 to \*.]*

That the bill of complaint of the complainant be, and the same is hereby dismissed, and that the complainant pay the defendant his costs of this suit, to be taxed by the register.

NOTE. — *Where the bill is intended to be dismissed without prejudice, there should be inserted the following clause after the word dismissed :*

But without prejudice to any other suit which the complainant may hereafter bring in relation to any matters of equity in controversy in this suit.

### **Petition for a Plaintiff to Dismiss his Bill with Costs.**

*[Title, &c.]*

Showeth, that your petitioner, having exhibited his bill in this honorable court against the above-named defendant, who has appeared *[and put in his answer]* thereto, your petitioner is now advised to dismiss his said bill.

Your petitioner therefore humbly prays, that the said bill may stand dismissed out of this court, with costs to be taxed by the register of this court.

### **Writ of Assistance.**

*[L. S.] The People of the State of New York, to the Sheriff of the county of Saratoga, greeting :*

Whereas, by a certain decree *[or decretal order]* of our Court of Chancery, in a certain cause there depending between A. B., complainant, and C. D., defendant, made at a Court of

Chancery held for the State of New York, at the town of Saratoga Springs, on the            day of           , in the year one thousand eight hundred and forty-three, before the chancellor [*or before the vice-chancellor of the 4th circuit*], it was, among other things therein contained, ordered, adjudged and decreed by the said court, that the said complainant should be forthwith put into possession of a certain farm or lot of land situate in the town of Day, in said county, known as lot No. 160, in the Kayaderosseras patent; and whereas the said complainant has not been let into, nor taken possession of the said farm or lot of land, or any part thereof, according to the tenor of the said decree, and whereas the said farm or lot of land is in the tenure and occupation of the said defendant; and whereas, by an order of our said Court of Chancery made in the said cause, on the            day of           , it was ordered that our writ of assistance should issue to you, the said sheriff, to put the complainant in possession of the said farm or lot of land, and him in such possession thereof from time to time to maintain and defend: Therefore, we command you that immediately after receiving this writ, you go to and enter upon the said farm or lot of land, and that you eject and remove therefrom all and every person or persons holding and detaining the same, or any part thereof, against the said complainant; and that you put and place the said complainant, or his assigns, in the full, peaceable and quiet possession of the said farm or lot of land, without delay; and him, the said complainant, in such possession thereof, from time to time, maintain, keep and defend, or cause to be kept, maintained and defended, according to the tenor and true intent of the said decree and order of our said court. Witness Reuben H. Walworth, Chancellor of our said State, at the town of Saratoga Springs, the            day of           , in the year one thousand eight hundred and forty-three.

J. M. D., *Register*.

J. E., *Solicitor*.

### **Injunction to Deliver Possession of Land.**

*Maryland, &c.*

The State of Maryland to Job Garretson, of Baltimore county, and every and all other person and persons whatsoever, who are in possession of all or any part of that part of the tract or parcel of land, situate in the county aforesaid, called "The Silent Cypress of Africa," or "The Silent Zephyrs of Africa," which is contained within the lines of a tract of land

called "Cole's Discovery." Whereas it hath been represented to the Court of Chancery, in a cause wherein Richard Cole is complainant, and you, the said Job Garretson, are defendant, that by the original decree in the cause passed on, &c., it was decreed that, &c., and that affidavit was afterwards made to the satisfaction of the chancellor, of the service of a copy of the said original decree, under the great seal of the State, upon you the said Garretson, and of your refusal and neglect to obey, fulfill and perform the said decree; and that by a subsequent decree or order made in the said cause, on the, &c., it was adjudged, ordered and decreed, that you the said Garretson, having neglected to execute the deed by the said original decree directed, the said decree hath operated, as the said deed would have operated, to convey unto the said complainant, Richard Cole, and his heirs, the land thereby directed to be conveyed, and that you, the said Garretson, should deliver possession of the said land to the said complainant, and that an injunction issue against you the said Garretson, to enjoin you to deliver possession of the said land to the said complainant; and the matters stated in the said representation being all just and true, therefore, in consideration of the premises, you, the said Job Garretson, your servants, agents and all persons assisting you, and every and all other person or persons in possession of the said land, are strictly enjoined and commanded, that you, each and every of you, do deliver the possession of the said land and premises, and every part and parcel thereof, to the said complainant, Richard Cole, pursuant to the said decree; and that you cease from any further molestation of the said Richard Cole, in the quiet possession of the said land. Hereof fail not at your peril. Witness, &c.

### **Habere Facias Possessionem.**

*Maryland, &c.*

*The State of Maryland to the Sheriff of Baltimore county,  
greeting :*

Whereas, by the original decree passed in the Court of Chancery on, &c., in a cause wherein R. C. is complainant, and J. G. is defendant, it was decreed, &c. And whereas, by a subsequent decree or order, made and passed in the said cause on the, &c., it was adjudged, &c. And whereas, according to the decrees aforesaid, and in conformity therewith, on the, &c., an injunction did issue directed to the said J. G., his servants,

agents and all other persons assisting him, and every and all other person or persons in possession of the said land, commanding that he, the said J. G., and all and every person or persons aforesaid, should deliver the possession of the said land and premises, and every part and parcel thereof, to the complainant, R. C., and that he, the said J. G., should cease from any further molestation of the said R. C. in the quiet possession of the said land. And whereas it hath been represented to the said Court of Chancery, that on the 4th of March, instant, at the county aforesaid, a true copy of the injunction so as aforesaid issued, was served on and delivered, in the presence of the said complainant, to the said J. G., and at the same time the original injunction, with the great seal appendant thereto, was shown to the said J. G., and that the said complainant, R. C., did then and there request and demand of the said J. G., that he would deliver the possession of the land in the said writ mentioned, according to the directions of the said writ, which he the said J. G. absolutely refused to do; and that on the same day, and in manner aforesaid, a true copy of the said writ of injunction was also shown and delivered to T. S., a tenant of the said J. G., and the original writ, with the great seal as aforesaid was also shown to the said T. S., which he then and there absolutely refused to comply with; and the said R. C., having applied to the said Court of Chancery for additional process to enforce the said decrees, know ye, therefore, that to complete and to carry into full effect the decrees of the said Court of Chancery, made and passed in manner aforesaid, the said Court of Chancery hath given, and from this time doth give to you, full power and authority to the land and premises aforesaid, situate in Baltimore county aforesaid, and in the decrees and injunction aforesaid mentioned and expressed, you approach and enter, and from thence the said J. G. and the said T. S., as well as all and every other person or persons in possession of the premises being, against the form and effect of the decrees and injunction aforesaid, you remove, and the said R. C. in full, quiet and peaceable possession of all and singular the premises aforesaid, immediately, and from time to time, as often as necessary, you put and place; and that the said R. C. so being put and placed in possession, you protect and keep quiet; and therefore you are hereby commanded, that immediately after the receipt of this writ, to the land and premises aforesaid, you approach and enter, and the said J. G. and the said T. S., as well as all and every other person and persons in possession of the said land and premises being, against the form and effect of the decrees and injunction aforesaid, from the possession thereof you remove, and to the said R. C. the full peaceable and quiet

possession of all and singular the premises, you deliver, put and place, and so from time to time as often as necessary; and the said R. C. so being put in possession, you preserve, keep and continue, and cause so be preserved, kept and continued, according to the true intent of the decrees and writ of injunction aforesaid, and of this writ. Witness, &c.

NOTE.—Where a court of equity decrees a conveyance from the defendant to the complainant, and on the service of a copy of the decree, under seal, with a tender of a deed in pursuance of the decree, the defendant refuses to deliver up possession and to execute the deed, a writ of injunction to compel delivery of the possession may be issued. And if that writ be not obeyed, the court will grant an habere facias possessionem. (1 Harr. & John. 370.)

# APPENDIX.

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ACTS OF CONGRESS JANUARY 24, 1873 AND JUNE 1, 1872.

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## FORMS OF PROCESS, WITH RULES OF THE SUPREME COURT OF THE UNITED STATES AND RULES OF PRACTICE FOR THE CIRCUIT COURTS OF THE UNITED STATES IN EQUITY.





# APPENDIX.

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## AN ACT

TO FIX THE TIME FOR HOLDING THE ANNUAL SESSION OF THE SUPREME COURT OF THE UNITED STATES, AND FOR OTHER PURPOSES.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this act the annual session of the Supreme Court of the United States shall commence on the second Monday of October in each year, and all actions, suits, appeals, recognizances, processes, writs, and proceedings whatever, pending or which may be pending in said court, or returnable thereto, shall have day therein, and be heard, tried, proceeded with, and decided, in like manner as if the time of holding said sessions had not been hereby altered.

Approved, January 24, 1873.

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## AN ACT

TO FURTHER THE ADMINISTRATION OF JUSTICE.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever, in any suit or proceeding in a circuit court of the United States, being held by a justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, there shall occur any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding jus-

tice or the presiding judge shall prevail, and be considered the opinion of the court for the time being; but when a final judgment, decree, or order in such suit or proceeding shall be entered if said judges shall certify, as it shall be their duty to do, if such be the fact, that they differed in opinion as to any question which, under the act of Congress of April twenty-ninth, eighteen hundred and two, might have been reviewed by the Supreme Court on certificate of difference of opinion, then either party may remove said final judgment, decree, or order to the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and *supersedeas*.

SEC. 2. That no judgment, decree, or order of a circuit or district court of the United States, in any civil action at law or in equity, rendered after this act shall take effect, shall be reviewed by the Supreme Court of the United States, on writ of error or appeal, unless the writ of error be sued out, or the appeal be taken, within two years after the entry of such judgment, decree, or order; and no judgment, decree, or order of a district court, rendered after this act shall take effect shall be reviewed by a circuit court of the United States upon like process or appeal, unless the process be sued out, or the appeal be taken, within one year after the entry of the judgment, decree, or order sought to be reviewed: *Provided*, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, or *non compos mentis*, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within the periods above designated after the entry of the judgment, decree or order, exclusive of the term of such disability. The appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require.

SEC. 3. That the Supreme Court may at any time, in its discretion, and upon such terms as it may deem just, and where the defect has not injured and the amendment will not prejudice the defendant in error, allow an amendment of a writ of

error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form where the defect has not prejudiced, and the amendment will not injure the defendant in error; and the circuit and district courts of the United States shall possess the like power of amendment of all process returnable to or before them.

SEC. 4. That a bill of exceptions hereafter allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto; and all process issued from the courts of the United States shall bear teste from the day of such issue.

SEC. 5. That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however,* That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

SEC. 6. That in common law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such State; and such circuit and district courts may, from time to time, by general rules, adopt such State laws as may be in force in the State in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor,

as are now provided by the laws of the State within which said circuit or district courts shall be held in like causes, or which shall be adopted by rules as aforesaid: *Provided*, That similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy.

SEC. 7. That whenever notice is given of a motion for an injunction out of a circuit or district court of the United States the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such places outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

SEC. 8. That no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

SEC. 9. That in all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, That such attempt be itself a separate offense.

SEC. 10. That on an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.

SEC. 11. That any party or person desiring to have any judgment, decree, or order of any district or circuit court re-

viewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterward with the permission of a justice or judge of the said appellate court.

SEC. 12. That in all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided*, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

SEC. 13. That when in any suit in equity commenced in any court of the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found, or where such personal service is not practicable, such order shall be published in such manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district, but said adjudication shall, as regards such absent defend-

ant without appearance, affect his property within such district only.

SEC. 14. That when a poor convict,<sup>\*</sup> sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, or to pay a fine, or fine and cost, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of [*state where oath is administered*], and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit: So help me God." And thereupon such convict shall be discharged, the commissioner giving to the jailor or keeper of the jail a certificate setting forth the facts.

SEC. 15. That if at any time after such discharge of such convict it shall be made to appear that in taking the aforesaid oath he swore falsely, he may be indicted, convicted and punished for perjury, and be liable to the penalties prescribed in section thirteen of an act entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved March third, A. D. eighteen hundred and twenty-five.

SEC. 16. That the fees of the commissioner for the examination and certificate provided for in this act shall be five dollars per day for every day that he shall be engaged in such examination.

Approved, June 1, 1872.

# FORMS OF PROCESS

OF THE

## SUPREME COURT OF THE UNITED STATES.

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WRIT OF ERROR UNDER THE 22D SECTION OF THE JUDICIARY  
ACT TO CIRCUIT COURTS OR DISTRICT COURTS EXERCISING  
CIRCUIT COURT POWERS.

UNITED STATES OF AMERICA, ss. :

*The President of the United States, to the Honorable the Judge  
of the Court of the United States for the  
District of , greeting :*

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, between , a manifest error hath happened, to the great damage of the said , as by complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the Monday of next, in the said Supreme Court to be then and there held ; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable , Chief Justice of the said  
Supreme Court, the of , in the year of  
our Lord one thousand eight hundred and .

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*Clerk of the Supreme Court of the United States.*

Though this is the writ of the Supreme Court, it may be issued from the office of the clerk of the Circuit Court, or of the District Court exercising Circuit Court powers, or (in appropriate cases) of the Territorial Court, under the seal of the court and signature of the clerk, as well as from the office of the clerk of the Supreme Court.

It regularly bears test of the first day of the preceding term, and is returnable to the first day of the succeeding term, if the judgment on which it issues was rendered thirty days before that period. If the judgment was rendered less than thirty days, it is returnable to the third Monday of the term. (8th Rule.)

It may be issued by the clerk without being allowed by a judge.

When it is to operate as a supersedeas and stay of execution, then it must be issued and copy thereof lodged for the adverse party in the clerk's office, where the record remains, within ten days, Sunday exclusive, after the entry of the judgment.

The original writ must be sent up with the transcript.

In framing the writ, care must be taken to set forth, in full, the names of all the plaintiffs in error and defendants in error. It will not do to say A. and others, or the heirs of A., or the like. Writs of error and appeals are frequently dismissed for this defect ; as will be seen in Chapter VI, Phillips' Practice.

# WRIT OF ERROR UNDER THE 25TH SECTION OF THE JUDICIARY ACT TO STATE COURT.

UNITED STATES OF AMERICA, ss. :

*The President of the United States, to the Honorable the* ,  
*greeting :*

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between , wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity ; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity ; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission,—a manifest error hath happened, to the great damage of the said , as by complaint ap-



pears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the \_\_\_\_\_ Monday of \_\_\_\_\_ next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable \_\_\_\_\_, Chief Justice of the said Supreme Court, the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_.

*Clerk of the Supreme Court of the United States.*

(or Clerk of the Circuit Court of the United States, as the case may be).

Allowed by \_\_\_\_\_.

The above form contains all the grounds of jurisdiction specified in the 25th section. Only the one appropriate to the particular case need be used.

All that is said in reference to the writ under the 22d section is applicable here; as, by the express terms of this section, the proceedings are to be the same as under the 22d section. But under this section the decisions require that the writ should be allowed, either by a justice of the Supreme Court or by the chief justice, or judge, or chancellor of the court rendering the judgment or decree.

There is no form prescribed for this purpose; but, when the application is made to a justice of the Supreme Court, a short petition, accompanied by copy of the record, would be proper. This petition should describe the suit, aver that the judgment or decree is final, that it was passed by the highest court of the State having jurisdiction of the controversy, and that it involved some one of the federal questions mentioned in the 25th section which was decided adversely to the right claimed by the petitioner.

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### APPEALS FROM CIRCUIT COURT.

As in cases of writ of error under the 25th section, the decisions of the court hold it to be necessary that there should be an application for appeal, and an allowance of it by the judge of the circuit, or by a justice of the Supreme Court; and this must be made to appear in the record when sent up.

When the appeal is to operate as a supersedeas, the allowance must be

had within ten days, Sunday excluded, from the entering of the decree, precisely as in writs of error.

If the application and allowance are made in open court, during the term at which the decree was rendered, this operates to give appellate jurisdiction, though no citation is issued.

The allowance of the appeal must appear in the record, and the names of the appellants and appellees must be set forth in full, as required in writs of error.

### THE CITATION.

THE UNITED STATES OF AMERICA, *greeting* :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the            Monday of            next, pursuant to a writ of error, filed in the clerk's office of the            , wherein            ; plaintiff in error, and you are defendant in error, to show cause, if any there be, why            rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable            of the            this            day of            , in the year of our Lord one thousand eight hundred and            .

On this            day of            , in the year of our Lord one thousand eight hundred and            , personally appeared before me, the subscriber,            , and makes oath that he delivered a true copy of the within citation to            .

When the citation is not issued under the 25th section, it is to be signed by the judge of the Circuit Court, or judge of the District Court exercising Circuit Court powers, or by the judge of the Territorial Court, or by a justice of the Supreme Court.

It is to be served on the adverse party, or his attorney of record, who is entitled to thirty days' notice.

When it is issued under the 25th section, it is to be signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, and the service is to be the same.

It would seem that, where the court is composed of several judges and one chief justice, no other member of the court than the chief justice is authorized to sign the citation.

The original citation, with the service thereon, should be returned with the transcript. It should regularly be tested, as of the first day of the preceding term, and be made returnable like the writ of error.

The citation is held to be unnecessary, in cases of appeal, when the appeal is taken in open court during the term. It may also be dispensed with by agreement, and the absence of a citation is cured by appearance.

## SECURITY OR BAIL IN ERROR.

The form of the bond is as follows:

Know all men by these presents, That we, \_\_\_\_\_, are held and firmly bound unto \_\_\_\_\_, in the full and just sum of \_\_\_\_\_, to be paid to the said \_\_\_\_\_, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_.

Whereas lately, at a \_\_\_\_\_, in a suit pending in said court, between \_\_\_\_\_, was rendered against the said \_\_\_\_\_, and the said \_\_\_\_\_ having obtained \_\_\_\_\_, and filed a copy thereof in the clerk's office of the said court to reverse the \_\_\_\_\_ in the aforesaid suit, and a citation directed to the said \_\_\_\_\_, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the \_\_\_\_\_ Monday of \_\_\_\_\_ next:

Now, the condition of the above obligation is such, That if the said \_\_\_\_\_ shall prosecute \_\_\_\_\_ to effect, and answer all damages and costs, if \_\_\_\_\_ fail to make \_\_\_\_\_ plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.]

[SEAL.]

[SEAL.]

Sealed and delivered in presence of

Approved by

If the writ of error be not sued out within ten days, and consequently cannot operate as a *supersedeas* of the execution, only security for the costs upon the writ of error need be given.

But when the writ is to so operate, the bond must be large enough to give full indemnity. What this is, will be seen by reference to the 29th rule of the Supreme Court.

This bond must be presented and approved by the judge allowing the citation. And when it is for a *supersedeas*, it must be approved and filed within ten days.

It is not necessary that the parties, appellant or plaintiff in error, should execute it; nor is it necessary that those who do execute it should be residents within the jurisdiction of the court rendering the judgment. All that is required is, that the security should be sufficient. But it is necessary that the bond should be made in favor of the appellees or defendants in error, as they appear on the record.

A copy of this bond should form a part of the transcript.

## BOND FOR COSTS IN THE SUPREME COURT.

The form of bond may be as follows :

Know all men by these presents, That we, , of , in the county of , and State of , and of , in the county of , and State of , are held and firmly bound unto D. W. Middleton, Clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said D. W. Middleton, his heirs, executors, administrators, or assigns ; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and .

Whereas lately, at , in a suit depending in said court, between was rendered against the said , and the said having obtained to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States, to reverse the in the aforesaid suit :

Now, the condition of the above obligation is such, That if the said obligors shall well and truly pay or cause to be paid to the said D. W. Middleton, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said D. W. Middleton, clerk as aforesaid, and charged to the said , in the prosecution of the said , then the above obligation to be void, otherwise to remain in full force and virtue.

[SEAL.]

Sealed and delivered in the presence of—

[SEAL.]

I, , of , the court of the United States for the district of , do hereby certify, that the within named obligors are known to me to be perfectly good and responsible for the within named amount.

N. B.—Insert the post offices (and if in a city, the streets and numbers) of the sureties. The party (plaintiff in error or appellant) should not join in the bond, as he is bound without it.

The plaintiff in error, or appellant, may, if he prefer, deposit the like sum of \$200, subject to the draft of the clerk, on account of the costs.

It should be remembered that this bond must be delivered or the deposit of \$200 made when the transcript is sent up. The clerk will neither file it nor docket it until this is done. From want of attention to this, records frequently lie months in the office before they are placed on the docket.

## APPEARANCE.

*Supreme Court of the United States.*

December Term, 187 . No. .

_____	}
_____	
v.	
_____	
_____	

The clerk will enter my appearance as counsel for [*appellant or plaintiff in error, as the case may be.*]

The 3d section of the 9th rule provides, that the appearance for the appellant or plaintiff in error must be entered at the time of filing the transcript. The præcipe must be signed by an attorney or counsellor of the Supreme Court.

## SUBPÆNA—ORIGINAL JURISDICTION.

*The President of the United States, to the Governor and Attorney General of the State of \_\_\_\_\_, greeting:*

For certain causes offered before the Supreme Court of the United States, holding jurisdiction in equity, you are hereby commanded, and strictly enjoined, that, laying all matters aside, and notwithstanding any excuse, you personally be and appear, on behalf of the people of said State of \_\_\_\_\_, before the said Supreme Court, holding jurisdiction in equity, on the first Monday in \_\_\_\_\_ next, at the city of Washington, in the District of Columbia, being the present seat of the national Government of the United States, to answer concerning things which shall there and then be objected to said State, and to do further, and receive on behalf of said State, what the said Supreme Court, holding jurisdiction in equity, shall have considered in this behalf; and this you may in nowise omit, under the penalty of five hundred dollars.

Witness the Honorable \_\_\_\_\_, Chief Justice of the said Supreme Court, at Washington city, this \_\_\_\_\_ day of \_\_\_\_\_.

(Signed by the Clerk of the Supreme Court.)

This writ was prepared by the court in the case of *New Jersey v. New York* (3 Pet. 467).

As to the service of this writ, see Chapter II, Phillips' Practice.

## CERTIFICATE OF DIVISION.

UNITED STATES OF AMERICA, {  
*North Carolina District.* }

At a Circuit Court of the United States, begun and held at Raleigh, for the district of North Carolina, on Wednesday, the 29th December, in the year of our Lord one thousand eight hundred and ten, and in the twenty-seventh year of American Independence.

Present the Honorable John Marshall and Henry Potter, Esquires.

ROBERT OGDEN, administrator *de bonis non*, with  
the will annexed, of Samuel Cornell,

*v.*

RICHARD SALTER, deceased.

This is an action of debt upon a bond, given by the defendant's testator to the testator of the plaintiff, on the 2d March, 1775.

The defendant, among other pleas, pleads in bar an act of the General Assembly of the State of North Carolina, passed in the year 1715, entitled "An act," &c., the 9th section of which is in the following words:

"That the creditors of any person deceased shall make their claim within seven years after the death of said debtor, otherwise such creditors shall be forever barred."

To which plea the plaintiff replies, in substance, that the plaintiff's testator was, at his death, a British subject, and the debt within the true intent and meaning of the fourth article of the treaty of peace, concluded between the King of Great Britain and the United States.

To this replication the defendant demurs, and the plaintiff joins in the demurrer.

The case coming on to be argued at this term, it occurred, as a question, whether the act of Assembly recited in the plea of the defendant was, under all the circumstances stated, and the various acts passed by the Legislature of North Carolina, a bar in this action.

On which question the opinions of the judges were opposed.

Whereupon, on motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may, dur-

ing the term, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, to be finally decided :

It is ordered, that the foregoing state of the pleadings, and the following statement of facts, which is made under the direction of the judges, and certified, according to the request of the plaintiff, by his counsel, and the law in that case made and provided, to wit :

*First.* That Samuel Cornell, the plaintiff's testator, was, and until his death continued to be, a subject of the King of Great Britain, and the defendant's testator was, and continued to be, until his death, a citizen of North Carolina.

*Second.* That the defendant's testator died in the year 1780; and the defendant, in the same year, was qualified as executor.

*Third.* That the plaintiff sued out his writ in this suit on the 5th day of October, 1798.

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UNITED STATES OF AMERICA, {  
*North Carolina District.* }

I, William H. Haywood, clerk of the Circuit Court for the district of North Carolina, do hereby certify the foregoing to be a copy from the minutes.

Given under my hand and seal of office, at Raleigh, on the fifth day of January, in the year of our Lord one thousand eight hundred and two.

W. H. HAYWOOD,  
*Clerk.*

[SEAL OF COURT.]

This form is given by Mr. Cranch, in the report of the case of Ogden v. Blackledge, with the note: "This being the first case under the late act of Congress, the certificate and statement are copied as a precedent, which may be of use in future practice. (2 Cr. 272.)"

For the principles and decisions which govern these certificates, see Chapter XXXV, Phillips' Practice.

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### MANDAMUS.

UNITED STATES OF AMERICA :

*To the Honorable* \_\_\_\_\_, *Judge of the District Court of the United States for the Northern District of New York,*  
*greeting :*

Whereas one Martha Bradstreet hath heretofore commenced and prosecuted in your court several certain real actions or

writs of right, in your court lately pending, between said Martha Bradstreet, demandant, and the following named tenants, severally and respectively, to wit: Apollos Cooper and others (naming them). And whereas heretofore, to wit, at a session of the Supreme Court of the United States, held at Washington on the       day of       , it appeared, upon the complaint of said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you according to law, all and singular the said writs of right then pending before your said court, upon the motions of the tenants aforesaid, were dismissed, for the reason that there was no averment of the pecuniary value of the lands demanded by the said demandant, in the several counts filed and exhibited by the said demandant against the several tenants as aforesaid; which orders of your said court, so dismissing the said actions, were against the will and consent of said demandant: whereupon the said Supreme Court, at the instance of said demandant, granted a rule, requiring you to show cause, if any you had, among other things, why a writ of mandamus from the said Supreme Court should not be awarded and issued to you, commanding you to reinstate and proceed to try and adjudge, according to the law and the right of the case, the several writs of right aforesaid, and the mises therein joined. And whereas at the late session of the said Supreme Court, held at Washington on the second Monday in January, in the year 1833, you certified and returned to the said Supreme Court, together with said rule, that, after the mises had been joined in the several causes mentioned in said rule, motions were made therein, on the part of the tenants, that the same should be dismissed upon the ground that the counts respectively contained no allegation of the value of the matter in dispute, and that it did not, therefore, appear by the pleadings that the causes were within the jurisdiction of the court; that in conformity with what appeared to have been the uniform language of the national courts upon the question, and your own views of the law, and in accordance, especially, with several decisions in the Circuit Court for the Third Circuit (4 Wash. C. C. Rep. 482, 624), you granted their motions; and, assuming that the causes were rightfully dismissed, it follows, of course, that you ought not to be required to reinstate them, unless leave ought also to be granted to the demandant to amend her counts; and whereas afterwards, to wit, at the same session of the Supreme Court last aforesaid, upon consideration of your said return, and of the cause shown by you therein against the said rule being made absolute, and against the awarding and issuing of the said writ of mandamus, and upon consideration of the argument of counsel, as well on your behalf,



showing cause as aforesaid, as on behalf of said demandant, in support of said rule, it was considered by the said Supreme Court that you had certified and returned to the said Supreme Court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of mandamus, pursuant to the rule aforesaid; the said Supreme Court being of opinion, and having determined on the matter aforesaid, that in cases where the demand is not made for money, and the nature of the action does not require the value of the things demanded to be stated in the declaration, the practice of the said Supreme Court, and of the courts of the United States, is to allow the value to be given in evidence, either at or before the trial of the cause, and would have a right to give it in evidence in the said Supreme Court: consequently she cannot be legally prevented from bringing her cases before the said Supreme Court; and it was also then and there considered by the said Supreme Court, that the peremptory writ of the United States issue, requiring you, the said judge of the said District Court, to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right, and the mises therein joined, lately pending in your said court, between the said Martha Bradstreet, demandant, and Apollos Cooper and others, the tenants aforesaid: Therefore, you are hereby commanded and enjoined, that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises joined therein, lately pending in your said court, between the said Martha Bradstreet, demandant, and the said Apollos Cooper and others, the tenants herein above named, so that complaint be not again made to the said Supreme Court; and that you certify perfect obedience and due execution of this writ to the said Supreme Court, to be held on the first Monday in August next. Hereof fail not at your peril, and have then and there this writ.

Witness the Honorable John Marshall, Chief Justice of the said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three.

W. T. CARROLL,  
*Clerk Supreme Court of the United States.*

The above writ was prepared under the order of the court, and is reported in *Ex parte Bradstreet* (7 Pet. 634).

(For the principles and decisions regulating this process, see Chapter XXXII, Phillips' Practice.)

## PROHIBITION

UNITED STATES OF AMERICA :

*The President of the United States, to the Honorable Richard Peters, Esquire, Judge of the District Court of the United States in and for the Pennsylvania District :*

It is shown to the judges of the Supreme Court of the United States, by Samuel B. Davis, that whereas, by the laws of nations and the treaties subsisting between the United States and the Republic of France, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the said Republic for legal adjudication, by vessels of war belonging to the sovereignty of the said Republic, acting under the same, and of all questions incidental thereto, does of right and exclusively belong to the tribunals and judiciary establishments of the said Republic, and to no other tribunal or tribunals, court or courts, whatsoever :

Wherefore the said Samuel B. Davis, the aid of the said Supreme Court most respectfully requesting, hath prayed remedy by a writ of prohibition, to be issued out of the said Supreme Court, to you to be directed, do prohibit you from holding the plea aforesaid, the premises aforesaid anywise concerning, further before you : You, therefore, are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in anywise touching, before you, nor anything in the said District Court attempt, nor procure to be done, which may be in anywise to the prejudice of the said Samuel B. Davis, or to the said corvette or vessel of war called the *Cassius*, or in contempt of the laws of the United States ; and also, that from all proceedings therein you do, without delay, release the said Samuel B. Davis, and the said corvette or vessel of war called the *Cassius*, at your peril.

Witness the Honorable John Rutledge, Esquire, Chief Justice of the said Supreme Court, at Philadelphia, this 24th day of August, in the year of our Lord one thousand seven hundred and ninety-five, and of the Independence of the United States the twentieth.

J. WAGNER,

*District Clerk Supreme Court of the United States.*

See Chapter XXXIII. Phillips' Practice.

## INJUNCTION.

THE UNITED STATES OF AMERICA, }  
In the Supreme Court. }

*The President of the United States of America, to Erastus Corning, John F. Winslow and James Horner :*

Whereas, in a certain suit in the Supreme Court of the United States, removed there by the appeal of the complainant from the Circuit Court of the United States for the northern district of New York, in which latter court the Troy Iron and Nail Factory was complainant and you were defendants in chancery, the said Supreme Court, by a decree made upon the hearing of the said cause, this eighteenth day of January, in the year of our Lord eighteen hundred and fifty-three, ordered, adjudged and decreed, among other things, that an injunction should issue under the seal of the said court, to restrain you, the said Erastus Corning, John F. Winslow, and James Horner, and each of you, perpetually, from using the improved machinery, with the bending lever, for making hook or brad-headed spikes, patented to Henry Burden on the 2d day of September, A. D. 1840, and assigned to the complainant. It is therefore, in execution of the said decree, hereby firmly enjoined and commanded you, and every of you, that from and immediately after being served with this writ or notice thereof, you and every of you do not use the aforesaid machinery; but that you and every of you do, from henceforth, entirely cease and desist from using the aforesaid improved machinery, with the bending lever, for making hook and brad-headed spikes, patented to Henry Burden the 2d day of September, A. D. 1840, and assigned to the complainant; and this you shall in nowise omit, at your peril.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court, this eighteenth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

*Clerk of the Supreme Court of the United States.*

## CERTIORARI.

THE UNITED STATES OF AMERICA.

*The President of the United States of America to the Judges  
of \_\_\_\_\_, greeting:*

Whereas, in a certain suit in said \_\_\_\_\_ court, in which \_\_\_\_\_ is plaintiff and \_\_\_\_\_ is defendant, which suit was removed by writ of error to the Supreme Court of the United States, agreeably to the act of Congress in such case made and provided, certain inaccuracies, defects and omissions in the record of the proceedings, have been suggested, to wit:

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify forthwith to the said Supreme Court, under your seal, a full, true, and complete transcript of said record and proceedings, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said Supreme Court of the United States may be able thereon to proceed, and do what shall appear to them of right ought to be done. Herein fail not.

Witness the honorable  
Supreme Court, this

\_\_\_\_\_, Chief Justice of the said  
day of \_\_\_\_\_.

\_\_\_\_\_  
*Clerk of Supreme Court.*

# RULES

OF THE

## SUPREME COURT OF THE UNITED STATES.

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### No. 1.

#### CLERK.

The clerk of this court shall reside and keep the office at the seat of the national Government, and he shall not practice, either as an attorney or counsellor, in this court, or any other court, while he shall continue to be clerk of this court. (*Adopted* 1790.)

The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court. (*Adopted* 1797, 1825.)

### No. 2.

#### ATTORNEYS.

It shall be requisite to the admission of attorneys or counsellors, to practice in this court, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

They shall respectively take and subscribe the following oath or affirmation, viz.:

I, ———, do solemnly swear (or affirm, as the case may be), that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States. (*Adopted* 1791.)

### No. 3.

#### PRACTICE.

This court consider the practice of the Courts of King's Bench and of Chancery, in England, as affording outlines for

the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary. (*Adopted* 1791.)

#### **No. 4.**

##### **BILL OF EXCEPTIONS.**

Hereafter the judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and such matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court. (*Adopted* 1832.)

#### **No. 5.**

##### **PROCESS.**

All process of this court shall be in the name of the President of the United States. (*Adopted* 1790.)

When process at common law, or in equity, shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney general of such State. (*Adopted* 1796.)

Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

#### **No. 6.**

##### **MOTIONS.**

All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion. (*Adopted* 1838.)

No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

##### **MOTION DAY.**

The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that

day to the other business of the court; the motion day shall be Monday of each week, in lieu of Friday, and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket. (*See Amendment, p. 401.*)

**No. 7.**

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And it shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time. (*Adopted 1833.*)

CONFERENCE ROOM.

2. The clerk shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the judges of the court. (*Adopted 1841.*)

**No. 8.**

RETURN TO WRIT OF ERROR AND RETURN DAY.

1. The clerk of the court to which any writ of error shall be directed may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court. (*Adopted 1797.*)

2. No cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed. (*Adopted 1823.*)

3. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in this court upon appeal or writ of error, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings. (*Adopted* 1817. *See Amendment, p. 401.*)

#### RETURN DAY.

4. In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day. (*Adopted* 1867.)

#### No. 9.

##### DOCKETING CASES.

1. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court. (*Adopted* 1806, 1821, 1835, 1853.)



2. But the defendant in error or appellee may, at his option, docket the cause, and file a copy of the record with the clerk of the court; and if the case is docketed, and a copy of the record filed with the clerk of this court by the plaintiff or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter during the term, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record, brought up by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered. (*Adopted 1867.*)

4. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, Utah, Nevada, Arizona, Montana, and Idaho. (*Adopted 1864.*)

### **No. 10.**

#### **SECURITY FOR COSTS.**

1. In all cases the clerk shall take of the party a bond, with competent surety, to secure his fees, in the penalty of two hundred dollars; or a deposit of that amount to be placed in bank subject to his draft. (*Adopted 1831.*)

#### **PRINTING RECORDS.**

2. In all cases, the clerk shall have fifteen copies of the records printed for the court, and the costs of printing shall be charged to the Government in the expenses of the court.

3. The clerk shall furnish copies for the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required.

4. In each case the clerk shall charge the parties the legal fees for but the one manuscript copy in that case.

5. In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.

6. In cases of dismissal for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

## ATTACHMENT FOR COSTS.

7. Upon the clerk of this court producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of the said fees. (*Adopted* 1808.)

**No. 11.**

## TRANSLATIONS.

Whenever any record, transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record. (*Adopted* 1851.)

**No. 12.**

## EVIDENCE.

1. In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission, to be issued from this court, or from any Circuit Court of the United States. (*Adopted* 1816.)

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission, to be issued from this court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice; Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible. (*Adopted* 1817.)

**No. 13.**

DEEDS, ETC., NOT OBJECTED TO, ETC., ADMITTED, ETC.

In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent. (*Adopted 1824.*)

**No. 14.**

CERTIORARI.

No *certiorari* for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* shall be made at the first term of the entry of the cause, otherwise the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay. (*Adopted 1824.*)

**No. 15.**

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed, if it be erroneous: Provided, however, that a copy of every such order shall be printed in some newspaper at the seat of government in which the laws of the United States shall be printed by authority, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing. (*Adopted 1821.*)

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate. (*Adopted* 1851.)

3. When either party to a suit in the Circuit Courts of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States from any final judgment or decree rendered in said Circuit Courts, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may supersede or stay proceedings on such judgment or decree, in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the court to which such writ of error or appeal is returnable the plaintiff in error, or appellant, shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error, or appellant, shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; and provided also that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided also, that the said represen-

tative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the cause shall proceed, and be heard and determined as in other cases. (*Adopted 1875.*)

**No. 16.**

NO APPEARANCE OF PLAINTIFF.

Where there is no appearance for the plaintiff when the case is called for trial, the defendant may have the plaintiff called and dismiss the writ of error, or may open the record and pray for an affirmance. (*Adopted 1806, 1849.*)

**No. 17.**

NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause. (*Adopted 1801.*)

**No. 18.**

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the costs of the plaintiff. (*Adopted 1851.*)

**No. 19.**

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement. (*Adopted 1849.*)

**No. 20.****PRINTED ARGUMENTS.**

1. In all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments, without regard to number of the case on the docket, if the counsel on both sides shall choose so to submit the same, within the first sixty days of the term; but twenty copies of the arguments, signed by attorneys or counselors of this court, must be first filed: ten of these copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel. (*Adopted* 1853, 1864.)

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel. (*Adopted* 1837.)

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument. (*Adopted* 1850.)

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel. (*Adopted* 1875.)

**No. 21.****ARGUMENTS—BRIEFS.****TWO COUNSEL.**

SEC. 1. Only two counsel shall be heard for each party on the argument of a cause.

**TWO HOURS.**

SEC. 2. Two hours on each side shall be allowed to the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

BRIEFS.

SEC. 3. The counsel for the plaintiff in error, or appellant, shall file with the clerk of the court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

SEC. 4. This brief shall contain, *in the order here stated*—

I. A concise abstract, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

II. An assignment of the errors relied upon, which, in cases brought up by a writ of error, shall set out separately and specifically each error asserted and intended to be urged, and in cases brought up by appeal the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous. If error is assigned to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

III. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

SEC. 5. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

SEC. 6. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

SEC. 7. Counsel for a defendant in error, or an appellee, shall file with the clerk twenty printed copies of his argument at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except that no assignment of errors is required, and no statement of the case, unless that presented by the plaintiff or appellant is controverted.

SEC. 8. Without such an assignment of errors, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned.

SEC. 9. When, according to this rule, a plaintiff in error, or an appellant, is in default, the case may be dismissed on motion; and when a defendant in error, or an appellee, is in default, he will not be heard, except on consent of his adversary, and with request of the court.

SEC. 10. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel. (*Adopted* 1875.)

### No. 22.

#### ORDER OF ARGUMENT.

The plaintiff or appellant in this court shall be entitled to open and conclude the case. But when there are cross appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument. (*Adopted* 1858.)

### No. 23.

#### INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered. (*Adopted* 1803, 1851.)

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of *ten per cent.*, in addition to interest, shall be awarded upon the amount of the judgment. (*Adopted* 1803, 1871.)

3. The same rule shall be applied to decrees for the payment of money in cases of chancery, unless otherwise ordered by this court.\*

### No. 24.

#### COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appel-

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\* Interest not allowed in admiralty, unless specially directed by the court. (20 How. 255.)



lee, as the case may be, unless otherwise agreed by the parties. (*Adopted* 1810, 1838.)

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the court. (*Adopted* 1838.)

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case. (*Adopted* 1838.)

4. Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States. (*Adopted* 1838.)

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. (*Adopted* 1838.)

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. (*Adopted* 1838.)

## No. 25.

### OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded. (*Adopted* 1834, 1835.)

2. The opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby. (*Adopted* 1835.)

3. The original opinions of the court shall be filed with the clerk of this court for preservation. (*Adopted* 1834.)

## No. 26.

## CALL OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided), and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court. (*Adopted* 1830, 1866.)

2. Ten causes only shall be considered as liable to be called on each day during the term, including the one under argument.

3. Criminal cases may be advanced, by leave of the court, on motion of either party. (*Adopted* 1866.)

4. Revenue cases, and cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the attorney general. (*Adopted* 1866.)

5. No other cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every cause which shall have been called in its order and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court. (*Adopted* 1830.)

6. Two or more cases, also involving the same question, may, by the leave of the court, be heard together; but they must be argued as one case. (*Adopted* 1866.)

7. If, after a cause has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the cause shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the cause, and it shall then be assigned to such place upon the docket as the court may direct.

No stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court. A cause can only be so passed upon application made and leave granted in open court. (*Adopted* 1875.)

**No. 27.**

ADJOURNMENT.

The court will, at every session, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment. (*Adopted* 1838.)

**No. 28.**

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing, directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the court. (*Adopted* 1857.)

**No. 29.**

SUPERSEDEAS.

*Supersedeas* bonds in the Circuit Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is

only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and "just damages for delay," and costs and interest on the appeal. (*Adopted* 1867.)

#### AMENDMENT TO 6TH RULE.

All motions to dismiss appeals and writs of error, except motions to docket and dismiss under the ninth rule, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for the plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days.

Affidavit of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless for satisfactory reasons further time be given by the court to either party. (*Adopted December Term, 1871.*)

#### AMENDMENT TO 8TH RULE.

That hereafter, in all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to, and transmit with, the record a copy of the opinion or opinions filed in the case.

RULES OF PRACTICE  
FOR THE  
COURTS OF EQUITY OF THE UNITED STATES.

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PRELIMINARY REGULATIONS.

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1.

The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3.

Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary

at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

## 4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

## 5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

## 6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order-book, and shall be heard at the rule day next after that on which the motion is

made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

Final process to execute any decree, may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party, cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

## 10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

## SERVICE OF PROCESS.

## 11.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

## 12.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

## 13.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person who is a member or resident in the family.

## 14.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.



15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17.

The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with

such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge and undertaking to speed the cause.

## 19.

When the bill is taken *pro confesso*, the court may proceed to a decree at the next ensuing term thereof, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

## FRAME OF BILLS.

## 20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the Circuit Court of the United States, for the district of : A. B., of , and a citizen of the State of , brings this his bill against C. D., of , and a citizen of the State of , and E. F., of , and a citizen of the State of . And thereupon your orator complains and says that," &c.

## 21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at

his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23.

The prayer for process of *subpœna* in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

## SCANDAL AND IMPERTINENCE IN BILLS.

## 26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

## 27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

## AMENDMENT OF BILLS.

## 28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterward, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do, of course), after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to

the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30.

If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and, if a plea, that it is true in point of fact.

32.

The defendant may, at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or

plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue ; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done ; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend

to some part of the same matter as may be covered by such demurrer or plea.

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS.

39.

The rule that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

## DECEMBER TERM, 1850.

*Ordered*, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

## 41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively, 1, 2, 3, &c. ; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively, 1, 2, 3, &c. ;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

## 42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

## 43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories



hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

- "1. Whether, &c.
- "2. Whether, &c."

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays

in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is set down shall be notified by an

entry, to be made in the clerk's order-book, in the form or to the effect following, that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In

every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

#### BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

##### 56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived as of course.

##### 57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

##### 58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

59.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory.

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not

be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63.

Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order-book an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient : Provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day ; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions ; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall

file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY—HOW TAKEN.

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

DECEMBER TERM, 1854.

*Ordered*, That the sixty-seventh rule, governing equity practice, be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

DECEMBER TERM, 1861.

*Ordered*, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows: Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined

before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted, as near as may be, in the mode now used in common law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend: provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

### *The Compulsory Attendance of Witnesses.*

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of act of Congress, September 24, 1789.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.



DECEMBER TERM, 1869.

AMENDMENT TO 67TH RULE.

Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained on motion for cause shown.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

70.

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's wit-

nesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

#### FORM OF THE LAST INTERROGATORY.

##### 71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

#### CROSS-BILL.

##### 72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

#### REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

##### 73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

##### 74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or

for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75.

Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath *viva voce* all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition, according to the acts

of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

## 78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

## 79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

## 80.

All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

## 81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon writ-

ten interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

## 82.

The Circuit Courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

## EXCEPTIONS TO REPORT OF MASTER.

## 83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

## 84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the circuit court.

## DECREES.

## 85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

## 86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" [*Here insert the decree or order.*]

## GUARDIANS AND PROCHEIN AMIS.

## 87.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

## 88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

89.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, *mesne* and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90.

In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1863.

92.

*Ordered*, That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the 8th rule of this court, regulating the equity practice, where the decree is solely for the payment of money.

AMENDMENT TO 41ST EQUITY RULE.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and an-

swer only ; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause ; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864. (*Adopted December Term, 1871.*)

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*The following provisions relating to equity practice are to be found in the act of 1st of June, 1872 :*

SEC. 7. That whenever notice is given of a motion for an injunction, out of a Circuit or District Court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

SEC. 13. That when in any suit in equity, commenced in any court of the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, such order shall be published in such manner as the court shall direct ; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of



the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district, but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.



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By SAMUEL TYLER.

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\* NOTE.—Demurrer can be to nothing but what appears upon the face of the bill. Where a fact is introduced into the demurrer, which is necessary to support it, it is what Lord Hardwicke called a *speaking* demurrer, as it encroaches upon the province of a plea by stating facts. But if the fact introduced is not necessary to support the demurrer, and would not, if it had been stated in the bill, it is mere surplusage, and does not make the demurrer a *speaking* demurrer. The introduction of a fact into a demurrer, which is necessary to support it, is fatal to the demurrer. Lord Hardwicke, therefore, only called it a *speaking* demurrer in ridicule, and did not intend it as a technical distinction. Hence Mitford ignored it. 2 Ves. 245; 2 Ves. jr. 83; 1 Sim. R. 5; Cooper's Eq. Plead. 111; Story's Eq. Plead. sec. 448.

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Every person interested in the matter in controversy should be made a party to the suit, in order that when the final decree is passed, the rights of all persons interested in the matter of the suit will be settled, and all further litigation be prevented, and the performance of the decree of the court be perfectly safe to those who are compelled to obey it, 16, 134, 256.

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Two classes of parties—complainants and defendants. To make a person defendant, process must be prayed against him; and if within the jurisdiction of the court, the prayer must be for immediate process; and if not within the jurisdiction, for process when he comes within it. Process must be served on the person before decree can be passed, 17.

Whether a party is a complainant or defendant depends on the side of the suit on which he stands, and not on his rights in the controversy. It is only requisite that the interests of the complainants be consistent; and it is immaterial that the defendants are in conflict with each other, or that the claims of some of them are identical with those of the complainants, 17, 18.

Though a conflict of interests between defendants is no objection to a suit in equity, yet if there be no necessity for it involved in the settlement of the complainant's claim, the court will not adjudicate between co-defendants, 18.

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[This Index is not alphabetical, but follows, as more practical, the steps in succession of a suit in equity, as they are given in the treatise of which it is an analytical index.]

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